

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, ET AL., APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants.

COMPLAINT TO SUSPEND, ENJOIN, ANNUL, AND SET ASIDE AN
ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed
October 7, 1960

Comes now the Brotherhood of Maintenance of Way
Employees, a voluntary association, the plaintiff herein,
for its cause of action against defendants, United States
of America and Interstate Commerce Commission, com-
plains and alleges as follows:

I

Jurisdictional Statement

1. This action is brought to suspend, annul, enjoin, and
set aside an order of the Interstate Commerce Commission
dated September 13, 1960, and issued on September 15,
1960, to be effective October 17, 1960, in an administrative
proceeding before that Commission designated as "*Erie
Railroad Company—Merger, etc.—Delaware, Lackawanna
& Western Railroad Company*." Finance Docket No. 20707.
A copy of the said order and the accompanying report of
the Commission, made a part thereof, are attached hereto
as Appendix A and are made a part hereof. This action
arises under Sections 5(2) and 17 of the Interstate Com-
merce Act (49 U.S.C. 5(2) and 17).

2. The jurisdiction and venue of this Court to hear the complaint and grant the relief requested herein are established by Sections 1336, 1398, 2284, and 2321 through 2325 of the Judicial Code (29 U.S.C. Sections 1336, 1398, 2284, 2321-2325) and Section 10 of the Administrative Procedures Act (5 U.S.C. § 1009). These provisions include [fol. 2] the requirement of a 3-judge court to hear and determine the action.

II

Parties

3. The plaintiff is a voluntary unincorporated association.

4. The headquarters of plaintiff are located at 12050 Woodward Avenue, Detroit 3, Michigan.

5. Plaintiff is the duly designated collective bargaining representative under the Railway Labor Act for certain employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company, in the Maintenance of Way Department of said railroads and has agreements with said railroad carriers concerning rates of pay, rules and working conditions of such employees. Said agreements confer upon such employees valuable property rights in relation to their employment. By virtue of the foregoing the plaintiff represents the interest of said employees and this action is brought on their behalf as well as on behalf of plaintiff.

6. The plaintiff through its chief executive officer is a member of the Railway Labor Executives' Association, a voluntary unincorporated association with which are affiliated the chief executive officers of the Railway Employees' Department, AFL-CIO, and 21 standard national and international railway labor organizations. The Railway Labor Executives' Association was an intervening party before the Interstate Commerce Commission in Finance Docket No. 20707 and represented the interests of employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company represented

by plaintiff in this action as well as the interests of employees of those railroads represented by the other standard national and international railway labor organizations.

7. The United States of America is made a defendant in this complaint pursuant to the provision in Section 2322 of Title 28 of the United States Code.

[fol. 3]

III

Nature of the Case

8. The Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company filed with the Interstate Commerce Commission an application under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) for authority to merge the properties and franchises, including motor carrier operating rights, of the Delaware, Lackawanna & Western Railroad Company into the Erie Railroad Company for ownership, management, and operation; the acquisition by the latter of sole or joint control, through ownership of stock of railroad carriers subsidiary to or affiliated with the former; and acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now used by the Delaware, Lackawanna & Western Railroad; and for other incidental relief. This application resulted in the report and order of the Commission referred to in Paragraph 1 above, which grants the application as requested subject to certain conditions. As a result of this order the railroad carriers are authorized to undertake operations on October 17, 1960, which will result in the abolishment of almost 2,000 jobs and the transfer of another 2,000 jobs over a period of five years from the effective date of the order.

9. The Railway Labor Executives' Association, representing the chief executive officer of plaintiff, and the chief executive officers of other railway labor unions, intervened in the proceeding before the Commission in opposition to the granting of the application and for the purpose of receiving the protection of employees required by Section 5(2) of the Interstate Commerce Act. Subparagraph (f)

4
of Section 5(2), particularly the second sentence thereof, specifically prohibits the Interstate Commerce Commission from approving any transaction pursuant to the provisions of Section 5(2) unless it provides as a condition to said approval "that during the period of four years from the effective date of such order such transaction would not result in employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Com-[fol. 4] pany being placed in a worse position with respect to their employment than they were prior thereto.

10. The provision of law governing the authority of the Commission in proceedings arising under Section 5(2) reads as follows:

"Sec. 5(2) (f). As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall *include terms and conditions providing that during a period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.*" (Emphasis supplied.)

11. In its order dated September 13, 1960, served September 15, 1960, and effective October 17, 1960, in Finance Docket No. 20707, the Interstate Commerce Commission failed and refused to impose conditions which would prevent employees from being placed in a worse position with respect to their employment and imposed instead conditions which provide the employees compensation in lieu

of employment, contrary to the express provisions above quoted, of Section 5(2)(f).

12. As a result of the Commission's order herein many employees of the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company represented by plaintiff will suffer irreparable injury through permanent loss of seniority and employment rights with those railroads in violation of the requirements of Section 5(2)(f).

IV

Irreparable Injury to Employees

13. The railroad applicants before the Commission submitted an exhibit, No. H-48, in which their opinion as to the effect of the merger on all employees over a 5-year period was set forth. It was estimated that during the first year following the effective date of the merger 403 jobs in all categories would be abolished; and 430 jobs would be transferred. The merged railroad, therefore, immediately upon the effective date of the Commission's order approving the merger, can and undoubtedly will proceed to abolish jobs and transfer jobs. As soon as the first job is abolished or transferred the seniority rights of the employees involved will be exercised and a process of displacement of junior employees by senior employees will commence. This process will start with the most senior man affected and continue down through the roster of employees until it reaches the youngest man, seniority-wise, in the employ of the railroads who will be deprived of his employment. The conditions imposed by the Commission require that certain monetary allowances be paid to employees deprived of their employment or placed in lower paying jobs. The second sentence of Section 5(2)(f) requires the Commission to prevent deprivation of employment. If the merger is allowed to proceed pending final disposition of this complaint the employees who will have been affected by the time the issue is finally determined will be irreparably injured in that their right to employment in no worse position than that which they enjoyed

prior to the merge will be irretrievably lost. The Commission, the railroads, and the courts would be powerless to turn back the clock, reverse the bumping process, recreate jobs which had been abolished, relocate employees who had been transferred and reemploy employees who had been deprived of their employment. Unscrambling the employment problem in the event of a determination setting aside the Commission order in this case would be a practical impossibility. Attached hereto and made a part hereof as Appendix C to this complaint is the affidavit of Raymond A. Flanagan which more particularly set forth the irreparable injury which will result to employees if the order of the Interstate Commerce Commission is not stayed pending disposition of this complaint. On the other hand any loss to the railroad occasioned by the issuance of a temporary restraining order will be relatively minor and temporary.

[fol. 6]

V

Allegations of Error

14. The report and order of the Interstate Commerce Commission decided September 13, 1960, served September 15, 1960, and effective October 17, 1960, referred to above is illegal and void for the following reasons:

(a) The order erroneously and illegally exceeds the statutory power of the Commission by approving a merger under Section 5(2) of the Interstate Commerce Act without abiding by the essential prerequisite to such approval set forth in the second sentence of Subparagraph (f) of Section 5(2).

(b) The report and order of the Interstate Commerce Commission referred to above erroneously interprets the second sentence of Section 5(2)(f) by viewing the language of that sentence as if it read "in a worse position with respect to their compensation" rather than "in a worse position with respect to their employment" which is its exact and precise language.

(c) The Commission erred in ignoring the plain language of the statute and the very thorough and unequivocal explanation found in the Congressional Record of the meaning of the second sentence of Section 5(2)(f) by the author of that sentence, Representative Harrington, and other legislators.

(d) The Commission erred in relying upon its decisions in cases decided prior to its decision in Finance Docket No. 20707 which imposed compensatory protection for employees under Section 5(2)(f) since those decisions did not hold that Section 5(2)(f) did not require additional protection for employees nor was the issue raised before the Commission in Finance Docket No. 20707 raised in those cases.

(e) The Commission erred in failing to follow the interpretation placed upon this provision of law by the language of the United States Supreme Court found in two separate decisions.

(f) The Commission erred in concluding that the imposition of conditions in accordance with the mandate of the second sentence of Section 5(2)(f) would not be consistent with the public interest because "conditions calculated to [fol. 7] preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the National Transportation Policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers." Such a finding has absolutely no basis in the record nor in the report itself.

(g) The Commission erred, not only in ignoring the many concise and explicit statements of the author of the legislation in question, but in misinterpreting the language of other members of the House which it quoted in its report.

15. The report and order of the Interstate Commerce Commission referred to in Paragraph 1 above, are, in the particulars set forth in Paragraph 14, based on an erro-

neous, improper and illegal construction of the Interstate Commerce Act, as amended, and are contrary to the requirements of Section 5(2)(f) of that Act, in excess of the Commission's statutory powers, and constitute an abuse of the Commission's authority and discretion.

16. Plaintiff and the employees it represents have fully pursued their administrative remedies before the Commission since the order herein complained of is the order of the entire Commission and the pro forma filing of a petition for reconsideration would be a futility. Plaintiff and those represented by it have no remedy in the premises at law, by action for damages or otherwise, save by complaint to this Court pursuant to the provisions of the Judicial Code as aforesaid.

VI

Prayer for Relief

Wherefore, plaintiff respectfully prays:

First: That in accordance with the provisions of Section 2284 of Title 28 of the United States Code, this Court immediately notify the Chief Judge of the United States Court of Appeals for the Sixth Circuit who shall designate two other Judges, at least one of whom shall be a Circuit Judge, to serve as members of a 3-judge court to herein determine this action.

[fol. 8] Second: That process issue against the defendants, United States of America and Interstate Commerce Commission; that service of a copy of the complaint be made upon the Attorney General of the United States, the United States Attorney for the Eastern District of Michigan, and the Interstate Commerce Commission; and that after answer by the defendants and after not less than 5 days' notice to the parties the application herein be given precedence and assigned for hearing at the earliest practicable day as provided by Section 2284 of Title 28 of the United States Code.

Third: That an interlocutory injunction shall issue herein after due notice of this application therefor and that

defendants be ordered upon a date fixed to show cause why said interlocutory injunction should not be granted; that meanwhile, and until the hearing and determination of the application for an interlocutory injunction as aforesaid, a temporary restraining order issue, as provided in Section 2284(3) of Title 28 of the United States Code, to prevent immediate, great and irreparable injury, loss and damage to the employees of the above-named railroads which will result as aforesaid before notice can be served and a hearing had upon the application for an interlocutory injunction, restraining the said defendants from placing into effect or operation the order of the Interstate Commerce Commission dated September 13, 1960, served on September 15, 1960, and effective October 17, 1960.

Fourth: That upon hearing of this action, a judgment issue annulling and setting aside as unlawful and void the challenged order of the Interstate Commerce Commission above described, and enjoining the Commission from approving the merger of the above-named railroads without complying with Subparagraph (f) of Section 5(2) of the Interstate Commerce Act;

Fifth: That the plaintiff be given such other, further, general, and different relief as the nature of the case may require and the Court may deem just and proper.

Respectfully submitted,

George E. Brand, George E. Brand, Jr., 3709-23
Cadillac Tower, Detroit 26, Michigan.

[fol. 9] William G. Mahoney, 620 Tower Building,
Washington 5, D. C.

Attorneys for plaintiff Brotherhood of Maintenance
of Way Employees.

APPENDIX "A" TO COMPLAINT
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20707

ERIE RAILROAD COMPANY—MERGER, ETC.—DELAWARE,
LACKAWANNA & WESTERN RAILROAD COMPANY

Decided September 13, 1960—Date of Service
September 15, 1960

1. (a) Merger of the properties and franchises, including motor carrier operating rights, of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control, through ownership of stock of railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now used by The Delaware, Lackawanna and Western Railroad Company, approved and authorized. Conditions prescribed.
2. Authority granted to Erie Railroad Company to issue shares of Erie-Lackawanna Railroad Company common stock without par value and scrip certificates, representing fractional shares in conversion of outstanding capital stock of the Erie Railroad Company, and The Delaware, Lackawanna and Western Railroad Company and pursuant to restricted stock options of the latter; and to assume obligations and liabilities of The Delaware, Lackawanna and Western Railroad Company under its outstanding mortgage bonds and its other securities; all in connection with the merger. Conditions prescribed. That portion of the application which seeks authority under section 20a to assume obligation and

liability in respect of conditional sales contracts dismissed for want of jurisdiction.

3. Certificate issued (a) permitting abandonment of portions of the lines of railroad of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company in Erie, Broome and Steuben Counties, N.Y., and Susquehanna and Lackawanna Counties, Pa.; and (b) authorizing construction of connecting lines of railroad and extensions of lines in Erie and Steuben Counties, N.Y., Susquehanna County, Pa., and Hudson County, N.J. Conditions prescribed.

M. C. Smith, Jr., Edward W. Bourne, Frederick G. Hoffman, Thomas D. Caine, Rowland L. Davis, Jr., Leonard D. Adkins, James F. Mulligan and Walter J. Cummings, Jr., for applicants.

Andrew P. Martin, R. G. Bleakney, Jr., John D. Morrison, Robert D. Brooks, Eugene M. Smith, Thomas O. Broker, James B. Osborne, John L. Davidson, Jr., Eugene S. Davis, Lawrence Berman, William Q. Keenan, J. Raymond Hoover, and Dickson R. Loos for intervening railroad carriers.

[fol. 11] H. R. Begley for the State of Illinois and Robert R. Welborn for the State of Missouri.

Charles P. Knapp, Robert M. Wightman, Robert J. McDowell, Ernest G. Peltz, Joseph Harrison, and A. P. Kaufmann for communities and civic organizations.

Arnold L. Fein for dissenting stockholders.

William G. Mahoney and Sam Del Grosso for organizations of railway employees.

Report of the Commission

By the Commission:

Exceptions to the report recommended by the hearing examiner were filed by the Railway Labor Executives Association (the association); the Cohocton Valley Committee, a group of dissenting stockholders of The Delaware, Lackawanna and Western Railroad Company (dissenting stock-

holders); The New York Central Railroad Company (New York Central); The New York, Chicago and St. Louis Railroad Company (Nickel Plate); and the Grand Trunk Western Railroad Company (Grand Trunk). The applicants replied and the case has been argued orally.

The Erie Railroad Company (Erie) and The Delaware, Lackawanna and Western Railroad Company (Lackawanna), common carriers by railroad subject to part 1 of the Interstate Commerce Act, by application filed July 6, 1959, as amended, seek authority (1) under section 5(2) of the Interstate Commerce Act (a) to merge the properties and franchises of the Lackawanna into the Erie, (b) for Erie, through ownership of stock, to acquire sole or joint control of carriers subsidiary to or affiliated with the Lackawanna, and (c) for Erie, (as successor in interest) to acquire trackage rights over lines of the Pennsylvania Railroad now used by the Lackawanna; (2) under section 20a, for Erie to issue capital stock and to assume obligations and liabilities of the Lackawanna under its outstanding mortgage bonds and other securities; and (3) under section 1(18)-(20), for a certificate of public convenience [fol. 12] and necessity permitting abandonment of certain segments of lines of railroad of the Erie and the Lackawanna, and authorizing construction by the surviving company of certain connecting tracks and extensions of the lines of railroad of the applicants. Extensive hearings have been held.

The terms of the proposed transactions, a description of the applicant carriers, the positions of the parties, and pertinent facts in regard to the transactions are set forth in the examiner's report, and will be repeated only to the extent necessary for clarity in our discussion of exceptions. We agree with the examiner's findings of facts and conclusions and, with some supplementation herein, they are adopted as our own.

Upon consummation of the merger, the separate corporate existence of Lackawanna will cease and the name of Erie, the surviving corporation, will be changed to Erie-Lackawanna Railroad Company, hereinafter sometimes referred to as the unified company.

Among the properties and franchises to be merged with Erie is Lackawanna's authority under certificates issued by us in Nos. MC 103516 and MC 103516, Subs 2, 3, 4, and 5, to perform service as a common carrier by motor vehicle auxiliary to, or supplemental of, its rail service, between stations on its line of railroad in New Jersey, New York, and Pennsylvania. An application is also pending in No. MC 103516, Sub 7, for Lackawanna to provide substituted motor-carrier service to additional points in New York and Pennsylvania. Erie holds authority under certificates in Nos. MC 101010, Subs 2 and 8, to perform substituted [Tok 13] motor-carrier service between certain points on its line of railroad in New York, Pennsylvania, and Ohio. It also has an application pending in No. MC 101010, Sub 10, for authority to perform substituted service between certain points on its line in Pennsylvania by means of highway trailers moving on through rail bills of lading which have had or will have a prior or subsequent movement in rail "piggyback" service. If the merger is consummated, it is assumed that the unified company will seek substitution of itself as applicant in the No. MC 103516, Sub 7, proceeding.

Exceptions of dissenting stockholders.—In their exceptions, the dissenting stockholders claim procedural errors were committed by the examiner in (a) denying requests for adjournments, (b) limiting cross-examination of applicants' witnesses, (c) denying cross-examination of applicants' witness Lewis G. Harriman, and (d) closing the hearing in the absence of counsel for the dissenting stockholders.

The instant application was filed July 6 and the hearing did not commence until September 29, 1959, almost 3 months later, and hearings were not completed until October 22, 1959. In our opinion, adequate time was afforded the stockholders for the preparation of their case, and adequate justification has not been shown for the adjournments requested. An examination of the record does not support the allegation that counsel was unduly limited in his cross-examination or that the examiner erred in closing the hearing in the absence of counsel, such absence being volun-

tary on his part and after the receipt of notice to appear. As to the witness Harriman (member of Lackawanna's board of managers, its executive committee, and the committee [fol. 14] for negotiating the terms of the merger), we have disregarded his testimony. Accordingly, the motion to reconvene the hearing to permit cross-examination of this witness is overruled.

In addition to objections described above, the dissenting stockholders allege that the stock distribution proposed in connection with the merger will not be just and reasonable to Lackawanna stockholders. They contend that appropriate consideration has not been given to the relative book values of the stocks involved (Lackawanna \$109.01 per share, Erie \$68.90 per share), to the preemptive rights of Lackawanna's stockholders, their alleged cumulative rights of voting, and to the sale by Lackawanna of its holding of Nickel Plate stock.

The dissenting stockholders are correct in their contention that all of such matters are properly for consideration in determining the justness and reasonableness of the terms of the proposed merger, and such consideration has been given in arriving at our conclusion that the terms are just, reasonable, and fair to stockholders of each of the carriers involved. A more important element, however, in determining the reasonableness of the terms is the comparative earning power of the two carriers in relation to the shares of stock outstanding. The examiner's report contains a thorough analysis of the comparative earnings of the two carriers and of other pertinent factors properly for consideration in appraising the reasonableness of the proposed [fol. 15] stock distribution. The record is convincing that the terms are just and reasonable, and that approval thereof will be consistent with the decision of the United States Supreme Court in *Schwabacher v. United States*, 334 U.S. 182, as well as other pertinent court decisions cited by the dissenting stockholders in support of their position. Not to be overlooked in connection with this subject is that the terms were arrived at as a result of arms-length bargaining by representatives of the carriers involved and have received approval of a great majority of the stockholders of each.

Exceptions of Cohocton Valley Committee.—This committee took exception to the omission from the examiner's findings, and his recommended certificate and order, of any requirement that the applicants construct and install necessary industrial sidings and spur-track facilities in keeping with their declaration on the record that such would be done. The applicants, in their reply, state that they have no objection to our imposing a condition to our authorizations, that necessary industrial sidings and spur-track facilities suitable to specific industries involved will be constructed at or near Coopers, Campbell, Bath, Savona, Avoca, Cohocton, and Wayland, N.Y., as referred to by the examiner. Our order will be so conditioned.

Exceptions of intervening railroad companies.—The examiner recommended the imposition of conditions for the maintenance of existing joint routes, interchange arrangements, switching practices, and solicitation restrictions, as follows:

1. Upon consummation of the merger, the Erie-Lackawanna Railroad Company shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission.

[fol. 16] 2. The present neutrality of handling traffic inbound and outbound by The Delaware, Lackawanna and Western Railroad Company shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier, without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between The Delaware, Lackawanna and Western Railroad Company, on the one hand, and all lines connecting with its tracks, on the other, shall be continued insofar as such matters are within the control of the Erie-Lackawanna Railroad Company.

4. The Erie-Lackawanna Railroad Company shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

5. The Erie-Lackawanna Railroad Company shall not do anything to restrain or curtail the right of industries now located on The Delaware, Lackawanna and Western Railroad Company to route traffic over any or all existing routes and gateways.

6. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

The exceptions of New York Central, Nickel Plate, and Grand Trunk relate to the foregoing conditions. New York Central agrees with the applicants that greater efficiency and economy in railroad operations are desirable and states that it would appear that the proposed merger would make possible more efficient operation of the applicants' properties. However, it takes the position that there should be no automatic change in the through routes for Lackawanna's traffic with connecting carriers as a result of this merger and that, under the recommended conditions, Erie would supposedly be bound to maintain existing routes and channels of trade via existing gateways, but that under its proposed plan of tariff publication New York Central would not know what traffic was entitled to which routes. [fol. 17] New York Central requests that we specifically find that the recommended conditions require the continued identification of Lackawanna routes and stations in the tariffs of the unified company. It states that it identifies the various segments of its own system in its tariff and that the Norfolk and Western Railway Company, recently merged with The Virginian Railway Company, does like-

wise. New York Central has presented a set of conditions (which were considered by the examiner in arriving at his recommendation) that it believes would insure the desired results.

Nickel Plate has also presented a set of suggested conditions which, in its opinion, would require the unified company to afford to Nickel Plate the same or equal competitive service via Buffalo that it may establish by way of its route by-passing Buffalo. Nickel Plate represents that, by asking for such conditions, it is not asking for anything more than it now has, and also requests that, at its option, it have the benefit of any more favorable service, interchange arrangements, or use of facilities which the unified company may accord to any other connection at Buffalo, including the right to operate to the unified company's proposed new yard over the tracks of Lackawanna.

As the basis for its exceptions and its suggested conditions, Nickel Plate states that it anticipates the diversion of at least \$3,647,000 in revenues from its system annually as a result of the proposed merger.

Grand Trunk, in its exceptions, requests that the conditions recommended by the examiner for the maintenance of existing joint routes, interchange arrangements, switch-[fol. 18] ing practices and solicitation restrictions be amended to include maintenance of both existing service and schedules.

The conditions recommended by the examiner have been imposed in a number of prior decisions under section 5 of the act. See *Detroit, T. & I. R. Co. Control*, 257 I.C.C. 355, *Louisville & N. R. Co. Merger*, 295 I.C.C. 457, and *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401. In our opinion, the conditions recommended by the examiner, and hereby adopted by us, provide just and reasonable limitations upon the unified company's ability in the future unjustly to favor certain routes and gateways or to vary the degree of cooperation with certain or any of the interveners in regard to schedules, interchange of freight, and train departure arrangements. To the extent that any such changes in handling the traffic of the applicants would violate one or more of the first five of the conditions the inter-

veners would have a forum for proper relief; to the extent such activities of the unified company might not comply with the procedures governing the determination of rates, routes, and the routings of traffic, the interveners would have recourse to the remedies provided in section 15 of the act; and to the extent the other forms of relief would be inadequate, the interveners may invoke the sixth condition, and apply for our consideration of modification of the conditions as such may be required in the public interest. In *Wheeling & L. E. Ry. Co. Lease*, 271 I.C.C. 713, 746, Division 4, in disposing of a request for the imposition of conditions similar to those proposed by New York Central which would require the continued identification of Lackawanna's routes and stations and which New York Central asserts it voluntarily imposed upon its own system, stated:

[fol. 19] Furthermore, we see no reason to require that the identity of the Wheeling be preserved for routing or billing purposes after operation has begun under the lease. The primary purpose of the transaction would thereby, at least to some extent, be defeated. The public interest will be served best by permitting a completely unified operation of the properties.

The same conclusion is warranted here with respect to Lackawanna.

In connection with transactions such as this, it is not practicable, nor would it be in the public interest, to impose conditions calculated to freeze the flow of traffic into a pre-existing pattern or to protect competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporation. Such action would prevent, to a substantial extent, the effectuation of service improvements to which the shipping public is entitled, and would unduly restrict the unified company in its solicitation and routing of traffic and the development of a strong competitive system. Particularly upon consideration of the financial condition and strength of the participants in the proposed merger, relative to the interveners generally, we

find no justification for more restrictive conditions than those recommended by the examiner. Such conditions are designed to maintain and keep open all routes and channels of trade via existing junctions and gateways, to preserve neutrality of handling traffic without discrimination, to protect traffic and operating relationships, to preserve the routing rights of shippers, and to keep open to all parties the right to return to this Commission for such modification or supplementation of the conditions as developments may show to be required in the public interest.

[fol. 20] It should be understood by the applicants that our reservation of jurisdiction embraces the power, upon our own motion or upon petition, to impose any or all of the conditions which have been requested by the interveners, if such action hereafter appears required by the public interest; and the exercise by the applicants of the authority herein granted will evidence their consent to our reservation of jurisdiction and an agreement by the unified company to grant such trackage rights to connecting railroads as we may find reasonably should be required because of the merger, upon such terms and conditions as we may find just and reasonable.

Exceptions of Railway Labor Executives' Association.—

The association contends that section 5(2)(f) of the act requires the prescription of labor protective conditions adequate to assure the employment of all adversely affected employees for a minimum of 4 years after the effective date of the merger, rather than the providing of compensation in lieu of employment. The association states, on oral argument, that it has raised this issue for the first time in this proceeding because of the numerous merger cases pending, which, according to the association, if approved, would reduce railroad employment by more than 25 percent. It contends that since the only employees which will be affected by the merger are those, estimated by the applicants to be 863 in number, who would refuse to transfer their place of employment and who would have to transfer in order to obtain protection, if their employment were protected instead of their compensation, it would be to the advantage of the applicants if section 5(2)(f) of the act

were interpreted as requested by the association. The applicants state that they have no knowledge of the specific cost of the conditions requested by the association and contend that, since the association's theory was advanced subsequent to the closing of the record herein, there is no necessity for their computing such cost.

Section 5(2)(f) requires us to condition our approval of mergers and other transactions between carriers so that these transactions "will not result in employees . . . being in a worse position with respect to their employment." An earlier sentence of the section provides that we "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The section does not speak of employees in a worse position "in" their present employment, but in a worse position "with respect to" or in comparison with their present employment. It appears that compensation is intended by the very terms of the section to make certain that the employee's position as it relates to his livelihood is unharmed by the transaction between carriers.

Since 1941 we have uniformly interpreted section 5(2)(f) to permit either employment or compensation of employees displaced in consolidations of carriers. The first case was *Cleveland & Pittsburgh Railroad Company, et al. Purchase*, 244 I.C.C. 793 (1941), wherein we permitted the carriers the foregoing alternatives to the requirements of section 5(2)(f) (at 796). Later that year, we held in *Texas & P. Ry. Co. Operations*, 247 I.C.C. 285, 294-95 (1941) that our duty under section 5(2)(f) to provide "a fair and equitable arrangement" for the protection of employees is fulfilled if the essential arrangement is limited to displaced and dismissed employees. We also held that "compensation [fol. 22] earned in any other employment by dismissed employees must be considered in determining whether they are in a worse position with respect to their employment."

In the next several years we approved other purchases and abandonments subject to compensation plans for displaced or dismissed employees. And, just as in the 1941 proceedings, the association acquiesced in this interpretation of the Commission's powers under section 5(2)(f). *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 252

I.C.C. 49, 252 I.C.C. 287 (1942), 257 I.C.C. 292 (1944); *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 198 *et seq.* (1944); *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, 704 *et seq.* (1944).

The legislative history of section 5(2)(f) supports the interpretation that Congress did not intend to require us to maintain employees in their jobs. An amendment to accomplish this very objective was rejected by the Congress. The amendment ("Harrington Amendment") would have provided:

Provided however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.¹

The present language of the section was approved after two conferences between the House and Senate. The second conference report, which contained the present language of the section, stated.

In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of [fol. 23] the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation.²

The conferees clearly intended to require compensation, since in their words "benefits to employees will be required to be paid" for a certain period.

¹ 84 Cong. Rec., Part 9, 76th Cong., 1st Sess., pages 9881-82.

² 86 Cong. Rec., Part 9, 76th Cong., 3d Sess., page 10167.

The subsequent discussion on the floor of the House confirms the interpretation put upon the language of the section by the second conference report. Representative Lea, one of the House managers, began the pertinent discussion:

The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.

There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have [fol. 24] changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.

We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write

³ *Id.* at 10178. The association dismisses the colloquy between Reps. O'Connor and Lea following Rep. Lea's introductory remarks since it was "made informally on the floor of the House," it "referred only to compensation," and was inconsistent with Rep. Lea's subsequent reiteration of the section's "full intent." Further remarks of the Congressman hereinafter reproduced indicate that the association's interpretation of this colloquy is strained.

specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands.

Mr. Vorys of Ohio. Mr. Speaker, will the gentleman yield?

Mr. Lea. I yield to the gentleman from Ohio.

Mr. Vorys of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?

Mr. Lea. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

Mr. Vorys of Ohio. That would be whether or not they were still employed?

Mr. Lea. Yes.

Mr. O'Connor. Mr. Speaker, will the gentleman yield?

Mr. Lea. I yield to the gentleman from Montana.

Mr. O'Connor. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to this employment. Does "worse position" as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

Mr. Lea. I take that to be the correct interpretation of those words. Our conference agreement followed the instructions of the House in that respect. It gives railway labor generous protection against sudden and long unemployment.

Representative Halleck, another of the House managers, later added:

[fol. 25] As to the Harrington amendment, I do not know what the author of that amendment is going to

do about this bill, but I do know and understand that the people whose cause he so valiantly championed are not objecting to this provision as it is now written. It follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation. This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law.

Finally, Rep. Wolverton, also a House manager, stated that he thought the Harrington amendment had intended no more than compensation to employees facing dismissal, but that in any event compensation was now clearly intended:

* * * It was recognized that the real intent of the (Harrington Amendment) sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into. The Committee on Interstate and Foreign Commerce of this House in presenting its original bill used language which it thought accomplished that purpose. We thought we were giving legislative assurance of at least a continuance of the Washington agreement which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce Commission as a condition precedent for its approval in the Rock Island case, *United States v. Lowden*, (308 U.S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. *We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that*

agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future. *Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment.* In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection *that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining.* (Emphasis added).

[fol. 26] * * * Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sudden dismissal and *financial assistance* that is not enjoyed by workers in any other industry. And, this is true without any exception or qualification whatsoever. (Emphasis added).

Although there is no clear holding on the point, the courts, too, generally have favored the interpretation that section 5(2)(f) refers to compensation and not to a job-freeze. In *United States v. Lowden*, 308 U.S. 225 (1939), the Court read the House and Senate bills only recently passed relating to section 5(2)(f) as a Congressional declaration that "fair and equitable provision for the compensation of (employee) losses . . . promotes the national transportation policy" (at 238). It thought that the effect of the Congressional action was merely to make compensation schedules mandatory rather than permissive as they had been under section 5(4)(b) (at 239).

The *Lowden* opinion was explained in *Railway Labor Executives' Association v. U.S.*, 38 F. Supp. 818, 824 (D.C. 1941) as recognizing the right of "displaced personnel" to "share a part of the gain" resulting from consolidations. The District Court opinion was affirmed by the Supreme Court, 315 U.S. 373 (1942). In *R.L.E.A. v. U.S.*, 339 U.S. 142, 155 (1950), the Court characterized our practice as

affording employees "compensatory protection" and apparently thought it was consistent with the statute.

In our opinion, the association's newly asserted position that the act requires us to maintain railway employees in their jobs is incorrect and untenable. Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be [fol. 27] consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers. In our opinion, the conditions which we are imposing here, and have imposed in prior cases under section 5, afford reasonable protection to employees against financial losses which may result from transactions authorized under that section. Accordingly, we affirm the finding of the examiner in this respect and our authorizations herein will be made subject, by reference, to the employee protective conditions imposed in the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271.

Conclusions.—Contentions of the parties herein as to either law or fact not specifically discussed have been given consideration and have been found to be without material significance or not justified.

The applicants request that, because of their critical financial condition, our certificate and order herein be made effective within 5 or 10 days of its service. We are of the opinion that this would not afford the interveners adequate time within which to take such steps as they deem warranted to protect their interests. Accordingly, our order will provide that it shall become effective 30 days after the date it is served.

We find that, subject to the specified conditions for the protection of adversely affected railway employees of the applicants, and the maintenance of existing joint routes, [fol. 28] interchange arrangements, switching practices,

and solicitation restrictions referred to hereinabove, (a) the merger of the properties and franchises of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control, through ownership of stock of railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now jointly used by The Delaware, Lackawanna and Western Railroad Company, upon the terms and conditions set forth above, which terms and conditions are found to be just and reasonable, are transactions within the scope of section 5(2) of the Interstate Commerce Act, as amended, and will be consistent with the public interest, will enable the Erie Railroad Company to use service by motor vehicle to public advantage in its rail operations and will not unduly restrain competition; and that, if the transactions are consummated, the Erie Railroad Company will be entitled to operate under the operating rights granted in Nos. MC 103514 and MC 103516, Subs. 2, 3, 4, and 5, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name, with duplications eliminated.

We further find, subject to the condition that, before issuing any of the stock herein authorized, the Erie Railroad Company shall file with this Commission a copy of the amendment to its certificate of incorporation duly certified by the appropriate public officer, providing for the changes in its stock, that (a) the proposed issue by the Erie Railroad Company of not exceeding 4,701,384-15/32 shares of common stock, without par value, and scrip certificates representing fractional interests therein, of Erie-Lackawanna Railroad Company, not exceeding 49,200 shares of common stock, without par value, of Erie-Lackawanna Railroad, to be sold at \$21.3125 a share to satisfy existing stock options granted under The Delaware, Lackawanna and Western Railroad Company's restricted stock option plan, and the issue to holders of Erie Railroad Company preferred stock, series A and B, of new certificates of Erie-Lackawanna Railroad Company on a share-

for-share basis; (b) the proposed assumption by it of obligation and liability in respect of the outstanding securities of The Delaware, Lackawanna and Western Railroad Company, including obligation and liability in respect of the payment of principal and interest on \$121,368,950 of mortgage and other funded obligations and \$19,463,000 of equipment trust obligations of The Delaware, Lackawanna and Western Railroad Company, all in connection with the proposed merger, as aforesaid, are for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and are reasonably necessary and appropriate for such purposes.

We further find that so much of the application herein which seeks authority under section 20a to assume obligation and liability under the joint agreement of merger, in respect of conditional sales contracts, should be dismissed for want of jurisdiction. *Lehigh Valley R. Co., Conditional Sale Contract*, 233 L.C.C. 359.

[fol. 30] We find further that, subject to the conditions for the protection of railway employees and for the construction of industrial side-tracks and facilities referred to, the present and future public convenience and necessity (a) permit abandonment of portions of the lines of railroad of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company in Erie, Broome, and Steuben Counties, N.Y., and Susquehanna and Lackawanna Counties, Pa., and (b) require construction of connecting lines of railroad and extensions of the applicants' respective lines in Erie and Steuben Counties, N.Y., Susquehanna County, Pa., and Hudson County, N.J., as described herein.

An appropriate order and certificate will be entered. Commissioner McPherson did not participate.

[Vol. 31]

Certificate and Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of September, A. D. 1960.

Finance Docket No. 20707

ERIE RAILROAD COMPANY—MERGER, ETC.—DELAWARE,
LACKAWANNA & WESTERN RAILROAD COMPANY

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the motion of the dissenting stockholders to reconvene the hearing to permit conclusion of cross examination and presentation of evidence by the said dissenting stockholders if they so desire, be, and it is hereby, overruled;

It is further ordered, That, subject to the conditions described and referred to in the aforesaid report, (a) merger of the properties and franchises of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control through ownership of stock of the railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now jointly used by The Delaware, Lackawanna and Western Railroad Company, in the manner and upon the terms and conditions described in the aforesaid report found just and reasonable, be, and they are hereby, approved and authorized;

It is further ordered, That, subject to the condition in the aforesaid report regarding the amendment of its charter, the Erie Railroad Company ~~be~~, and it is hereby, authorized (a) to issue not exceeding 4,701,384-15/32 shares of Erie-Lackawanna Railroad Company common stock without par value, and scrip certificates representing fractional interests in such stock, in conversion of 2,450,090 outstanding and 118³/₈ reserved for issuance shares of common stock, without par value, of Erie Railroad Company, on a 1¹/₄-for-1 basis, and 1,638,624 shares of common stock, without par value, of The Delaware, Lackawanna and Western Railroad Company, on a share-for-share basis, (b) to issue not exceeding 49,200 shares of common stock without par value, of Erie-Lackawanna Railroad Company, to be sold at \$21.3125 each to satisfy existing options granted under The Delaware, Lackawanna and Western Railroad Company's restricted stock option plan, (c) to issue to holders of its preferred stock, series A and series B, at the option of the holder, a new Erie-Lackawanna Railroad Company certificate or certificates on a share-for-share basis, bearing certain information as to the voting powers of each class of stock which said company is authorized to issue, and (d) to assume obligation and liability in respect of "securities," as defined in section 20a(2) of the Interstate Commerce Act, of The Delaware, Lacka-[fol. 32] wanna and Western Railroad Company, including obligation and liabilities in respect of the payment of the principal and interest or dividends on mortgage and other funded obligations of which (as of March 31, 1959) there were outstanding or held in its treasury \$121,368,950 of mortgage obligations, and \$19,163,000 of equipment-trust obligations, all in connection with the merger hereinabove approved and authorized;

It is further ordered, That, except as herein authorized, said securities shall not be sold, pledged, repledged, or otherwise disposed of by Erie Railroad Company, unless or until so ordered or approved by this Commission;

It is further ordered, That Erie Railroad Company shall report concerning the matters herein involved in conformity

with the order of the Commission, by Division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the portion of the application which seeks authority under section 20a to assume obligation and liability, under the joint agreement of merger, in respect of conditional sales contracts, be, and it is hereby, dismissed;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities, or interest or dividends thereon, on the part of the United States;

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place;

It is hereby certified, That, subject to the conditions for the protection of affected railway employees and the construction of industrial sidings and spur track facilities referred to in the aforesaid report, and contingent upon the merger transaction approved and authorized herein being consummated, the present and future public convenience and necessity (a) permit abandonment of portions of the lines of railroad of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company in Erie, Broome, and Steuben Counties, N.Y., and Susquehanna and Lackawanna Counties, Pa., and (b) require construction of connecting lines of railroad and extensions of the applicants' respective lines in Erie and Steuben Counties, N.Y., Susquehanna County, Pa., and Hudson County, N.J., described in the report of the hearing examiner; *Provided, however*, and this certificate is issued upon the express condition, that the construction authorized

shall be commenced on or before March 31, 1961, and be completed on or before December 31, 1961;

It is further ordered, That the Erie Railroad Company shall report in writing the commencement and completion of the lines of railroad authorized to be constructed, within 15 days after such commencement and completion, respectively;

It is further ordered, That the applicants when making such changes in tariffs as may be required, may do so upon notice to this Commission and to the general public by not [fol. 33] less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and shall in schedules making such changes refer to this certificate and order by date and docket number;

It is further ordered, That if the authority herein granted is exercised, the applicants shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein;

It is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders herein as hereafter may be necessary or appropriate;

It is further ordered, That this certificate and order shall become effective from and after 30 days from the date of its service; and

It is further ordered, That, if the authority granted in the certificate herein is not exercised within two years from the date of service of this certificate and order, it shall be of no further force and effect.

By the Commission.

HAROLD D. MCCOY
Secretary

[fol. 34]

APPENDIX "C" TO COMPLAINT

STATE OF NEW YORK)
) SS:
 COUNTY OF NEW YORK)

RAYMOND A. FLANAGAN being duly sworn, deposes and says:

1—That he is the General Chairman, Delaware, Lackawanna and Western System Division, Brotherhood of Maintenance of Way Employees with offices at 218 Adams Avenue, Scranton, Pennsylvania, and he has held this elective office since April 1936 and prior to that time was employed in the Maintenance of Way Department of the Delaware, Lackawanna and Western Railroad Company as a trackman, time keeper and assistant foreman. His employment with the DL&W began in April 1928.

2—As General Chairman it is his duty to represent employees in the Maintenance of Way Department of the Delaware, Lackawanna & Western Railroad Company in all matters affecting their wages, working rules and work conditions, and he represents said employees in the presentation of their grievances with the management of the DL&W.

3—He is familiar with the complaint filed by the Brotherhood of Maintenance of Way Employees against the United States and the Interstate Commerce Commission in the United States District Court for the Eastern District of Michigan to restrain the operation of the order entered by the Interstate Commerce Commission approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company until such time as said order is conditioned in accordance with the requirements of Section 5(2)(f) of the Interstate Commerce Act.

4—That the facts herein stated are based upon personal knowledge of exhibits submitted by the Erie and the Delaware, Lackawanna and Western to the Interstate [fol. 35] Commerce Commission in the proceeding designated Finance Docket No. 20707 and the Railroads testimony offered in support thereof; conferences with management officials of the Erie and the Delaware, Lackawanna

& Western as to their plans for their Maintenance of Way forces after the merger becomes effective; collective bargaining agreements governing the rights of both railroad managements and their employees in the Maintenance of Way Departments; and the existing seniority rosters of employees which evidence each employee's seniority rights in the event of job vacancies due to transfer of work, death, retirement, dismissal or resignation of employees or abolishment of jobs.

5—Upon the effective date of the merger the Erie and the Delaware, Lackawanna and Western will make certain changes in work assignments and work forces and will reconstitute certain seniority districts which will bring into play the seniority rights of the employees of the Maintenance of Way Departments of both railroads.

6—The specific changes to be made and the date of the changes have not been made known by the Erie and the DL&W managements, however, on October 17, 1960, those managements will be authorized to make any changes they deem necessary to effectuate the merger, and conferences with those managements indicate that many such changes will take place immediately.

7—Under the provisions of the Interstate Commerce Commission order dated September 13, 1960 and issued on September 15, 1960 the Erie-Lackawanna, as the merged railroads will be known, will be able to abolish any and all jobs they deem necessary to effectuate the merger and the employees who are deprived of employment as a result of such job abolishments will be entitled to certain monetary allowances. Once the jobs are abolished however, and the [fol. 36] senior employees exercise their seniority rights to secure the positions of the employees with seniority rights junior to them with resultant transfers, lay-offs, etc., it will be a practical impossibility, should the Court sustain the complaint of the Brotherhood of Maintenance of Way Employees to "turn back the clock" and recreate the abolished jobs, move employees whose transfers were caused by those abolishments and thereby so restore the present status quo as to comply with the mandate of Section 5(2)(f). Attempts at such restoration could not be successful and would cause additional expense to the Erie-Lackawanna Management.

8—The result of such a situation would irreparably injure the employees involved because they would be deprived permanently of employment with the Erie-Lackawanna Railroad. Other employees would be transferred and the retransfer of such employees throughout the Erie-Lackawanna system would cause great and irreparable injury to them.

9—The Erie and the Delaware, Lackawanna & Western managements have testified that 600% more jobs will be created by natural attrition and will be abolished because of the merger and therefore no hardship should result to the Erie-Lackawanna as a result of the imposition of the employment protective conditions required by Section 5(2)(f). For example, the railroad management testified that during the first year following the effective date of the merger 2,507 will be created by attrition while 403 will be abolished.

10—However, if the conditions required by Section 5(2)(f) are not imposed many employees entitled to be retained in their employment will be forever deprived of that employment.

11—The railroad managements have testified that they intend to effect numerous abandonments of lines of railroad [fol. 37] after October 17, 1960 and also shift certain freight traffic from the lines of the DL & W to those of the Erie. The result of any of these abandonments and shifts of traffic will be a lessening of work for Maintenance of Way employees, abolishment of many jobs, and the transfer of other jobs. The employees affected will exercise their seniority rights and displace junior employees at other points. These employees in turn will displace employees junior to them and so on until those employees at the bottom of the seniority rosters will be deprived of employment. Such exercise of seniority rights will result in transfers of employees from one point to another and finally in the deprivation of the employment of the youngest employees. Should the Court uphold the complaint of the Brotherhood of Maintenance of Way Employees and enforce the requirements of Section 5(2)(f) the employees who had been deprived of their employment would have to be re-employed, all seniority rights readjusted, em-

ployees retransferred and job abolishments take place through natural attrition.

FURTHER deponent sayeth not.

/s/ RAYMOND A. FLANAGAN

Sworn to before me this
6th day of October, 1960

/s/ ROSE McCANN

ROSE McCANN

Notary Public, State of New York

No. 41-7793900, Queens County

Cert. Filed in New York County

Term Expires March 30, 1962

[Vol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER AUTHORIZING INTERVENTION OF PARTIES, DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY AND ERIE
RAILROAD COMPANY—October 10, 1960

At a session of said Court held in the
Federal Building; Detroit; Michigan on
October 10, 1960.

Present: The Honorable Thomas P. Thornton, District
Judge.

The Delaware, Lackawanna and Western Railroad Com-
pany and Erie Railroad Company having moved for leave

to intervene as parties defendant herein pursuant to Title 28, United States Code, § 2323, and Rule 24 of the Federal Rules of Civil Procedure, said motion having come on to be heard before this Court on October 10, 1960 and being consented to by the parties of record, and after due consideration thereof, it is

Ordered that said motion be, and hereby is, granted, and it is further

Ordered, that:

- (1) The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company, as parties [fol. 39] defendant, may file pleadings and be otherwise represented herein by counsel in the same manner and with like effect as if they were named as original parties to this action;
- (2) the names of Rowland L. Davis, Jr., whose address is 140 Cedar Street, New York 6, New York, Cravath, Swaine & Moore, 15 Broad Street, New York 5, New York, and Bodman, Longley, Bogle, Armstrong & Dahling, 1400 Buhl Building, Detroit 26, Michigan be entered as attorneys for the intervenors named above in this action;
- (3) copies of any answers, pleadings, motions, notices, orders and other documents in said action be served upon intervenors' attorneys of record; and
- (4) Intervenors be given an opportunity to be heard on any application to the Court for any decree, injunction, order, determination or finding with respect to any of the matters raised in this proceeding.
- (5) Intervenors may file and serve a pleading setting forth their claim or defense no later than October 14, 1960.

Thomas P. Thornton, District Judge.

[fol. 40]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER AUTHORIZING INTERVENTION OF PARTIES, RAILWAY
LABOR EXECUTIVES' ASSOCIATION—October 12, 1960

At a session of said Court held in the Federal Building,
Detroit, Michigan on October 12, 1960.

Present:

THE HONORABLE THOMAS P. THORNTON

District Judge

The Railway Labor Executives' Association having moved for leave to intervene as a party plaintiff herein pursuant to Title 28, United States Code, § 2323, and Rule 24 of the Federal Rules of Civil Procedure, said motion having come on to be heard before this Court on October 12, 1960 and after due consideration thereof, it is

Ordered that said motion be, and hereby is, granted, and it is further.

Ordered, that:

(1) The Railway Labor Executives' Association be treated herein as if it had been an original party plaintiff to the Complaint;

(2) The Railway Labor Executives' Association may file pleadings and be otherwise represented by counsel in the same manner and with like effect as if it were an original party plaintiff to this action;

(3) Copies of any pleadings, orders and other documents [fol. 41] in said action be served upon intervenor's attorneys of record; and

(4) Intervenor be given an opportunity to be heard on any matter pending before this Court in this proceeding.

Thomas P. Thornton, District Judge.

[fol. 42]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

Transcript of Proceedings—October 12, 1960

Proceedings had and testimony taken in the above-entitled matter before Honorable Thomas P. Thornton, District Judge, at Detroit, Michigan, on Wednesday, October 12, 1960, at nine-thirty o'clock in the forenoon.

APPEARANCES:

William G. Mahoney, Esq., George E. Brand, Esq., and George E. Brand, Jr., Esq., Appearing on behalf of the Plaintiff.

Orrin C. Jones, Esq., Assistant United States Attorney, Appearing on behalf of the Defendant, United States of America.

B. Franklin Taylor, Esq., Appearing on behalf of the Defendant, Interstate Commerce Commission.

[fol. 43] Rowland L. Davis, Jr., Esq., Messrs. Crayath, Swaine & Moore (By Ralph L. McAfee, Esq.), Messrs. Bodman, Longley, Bogle, Armstrong & Dahling (By Richard D. Rohr, Esq.), Appearing on behalf of the Interveners, Delaware, Lackawanna & Western Railroad Company and Erie Railroad Company.

[fol. 44]

STATEMENT BY MR. MAHONEY ON BEHALF OF PLAINTIFF

Mr. Mahoney: Now, your Honor, as we view the matter, the issue before your Honor at this time is a very limited one. It is one which arises under the United States Code, and it is for a very limited purpose.

As is stated in Section 2324 of that Code, a District Court "may restrain or suspend, in whole or in part, the operation of the Order of the Interstate Commerce Commission pending the final hearing and determination of the [fol. 45] action," which in this case, of course, must be heard and determined by a 3-Judge District Court.

We are here merely to determine whether the operation of the Interstate Commerce Commission Order, which becomes effective on Monday, October 17th, should be restrained in whole or in part to prevent irreparable injury to the plaintiff, the intervening plaintiff, and the employees they represent of these two railroads pending the expeditious hearing of this case before a 3-Judge Court.

Now, as Mr. Brand indicated, the railroad, the intervening railroad defendants, have served an Answer in this case to the Complaint, which I saw last night about eight o'clock, and in reading it I find that they failed or they refused to admit or deny that the plaintiff Brotherhood is an unincorporated association with headquarters in Detroit;

That it represents employes of the Erie and DL in this case, for whom it is bargaining agent;

And also refuses to admit or deny that the RLEA represents the interest of the plaintiff Brotherhood and the employes it represents.

The Answer denies that the RLEA, the Railway Labor Executives Association, intervening plaintiff, presented to the Interstate Commerce Commission the same claims which the Brotherhood presented to the Court in this [fol. 46] case.

It challenges the accuracy of the number of jobs which are stated in the Complaint as being abolished or transferred.

It denies that 5 (2) (f) governs the authority of the ICC in this matter.

It denies any irreparable injury will result to employes of the railroad should the merger become effective on the 17th of October under the conditions imposed by the Commission.

And it denies that the plaintiff or the employes represented by the plaintiff, the Brotherhood, pursued the administrative remedies available to them before the Interstate Commerce Commission since neither the plaintiff nor the employes they represent were parties before the Interstate Commerce Commission.

They claim as affirmative defenses that the plaintiff is guilty of laches because, while the Order of the Interstate Commerce Commission was served on September 15th, the plaintiff waited 22 days before filing its Complaint, and I point out in that regard it was also filed over ten days before the Order would become effective.

They claim that irreparable injury will result to employes—or, rather, to the railroad defendants if any delay is granted by this Court in the effectuation of the merger. [fol. 47]. Now, with regard to these matters which the Answer raises, the factual differences, I would like to call to the stand Mr. Harold C. Crotty.

Mr. Crotty.

HAROLD C. CROTTY was thereupon called as a witness on behalf of the Plaintiff, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

The Clerk of the Court: Your name, please?

The Witness: Harold C. Crotty.

By Mr. Mahoney:

Q. Mr. Crotty, would you give your full name, business address, and occupation, to the Court, please?

A. My name is Harold C. Crotty. My office address is 12050 Woodward Avenue. I am the President of the Brotherhood of Maintenance of Way Employees.

Q. The President of the organization which instituted the present suit?

A. Yes, sir.

Q. How long have you been the President of that organization?

A. A little over two years.

Q. What office did you hold prior to that time, and for what length of time?

[fol. 48] A. For the ten-year period prior to 1958, I was assistant to the president of the International Brotherhood.

Q. Is the Brotherhood an incorporated or an unincorporated association?

A. It is unincorporated.

Q. Where are its headquarters?

A. In Detroit, Michigan.

Q. When was it founded?

A. In 1873.

Q. Is the Brotherhood the collective bargaining representative of the employees of the maintenance of way craft of both railroad defendants?

A. Yes, we are.

Q. Has it been duly authorized and recognized as such bargaining agent under the Railway Labor Act?

A. It has.

Q. Do you have any contracts with the railroads with regard to the employees you represent?

A. Yes, we have contracts with both the Erie and DL & W.

Q. What do these contracts cover, very generally?

Mr. Davis: I object to that. I think the contracts are the best evidence, if the Court please, as to what they cover and what they provide.

The Court: I will sustain the objection.

By Mr. Mahoney (continuing):

Q. What is the duty of a collective bargaining agent [fol. 49] under the Railway Labor Act?

Mr. Davis: I object to that. I think the Act speaks for itself. I think we can look to the Act for the law.

The Court: Well, we can get the Act, but if he knows it will save the trouble of getting the Act.

Go ahead.

I don't think we should be too picayunish here in our objections. All we are trying to do is get the thing out in the open.

A. Well, our responsibility under the Act obligates carriers and the Brotherhood to negotiate in behalf of the employees concerning rates of pay, rules, and working conditions.

Q. Would you describe the work performed by the employees whom you represent on these railroads—which the organization represents?

A. Well, generally, the maintenance of way employees build and maintain the tracks and the bridges and buildings that are used by the railroad companies in their operation as a common carrier.

In addition, the employees we represent provide the protection at highway crossings, and they operate the machinery that is used in the maintenance of way department.

Q: How many employees do you have presently on each [fol. 50] of these railroads that you represent, if you know?

A. Well, we have about 600 on the DL & W and approximately 1600 on the Erie.

Q. Now, with regard to your contracts, do you know whether these contracts will remain in effect, or will they be terminated upon this merger of the Erie and the DL?

A. The contracts will remain in full force and effect until such time as the parties negotiate a change.

Q. Under the contracts which you maintain with—which your organization maintains with the Erie and the DL & W, what precisely happens to an employee when a job is abolished by either or both of the railroads?

A. In the railroad industry, the working agreements provide for the establishment of seniority, and in the operation of that seniority, in instances where forces are increased or forces are reduced, if positions are abolished, an employee will exercise the seniority that has been credited to him on the seniority rosters that are drawn up and posted as a requirement under the agreement.

For example, an employee who had been in the service of either railroad for fifteen years would have a seniority date of 1945. The month and the day would be identified. If his job were abolished, he, in turn, would have the right to displace an employee junior in service to him, and this employee that he displaced would, in turn, have the right [fol. 51] to displace another employee junior to him.

Q. And, to your knowledge, do these displacements ever require these employees to relocate over any distances at all?

A. It is not unusual for a seniority territory to be, oh, one hundred miles in length. And, when seniority is exercised at certain points in that territory, it in some instances requires the employee to move his home and his headquarters point.

Q. Now, could the—once the employee has been bumped—I believe it is called—from his position by a senior employee and relocates to another point on the line, moves his family over, is it possible that because of

further abolishments of jobs this single employee might be relocated again?

A. Yes, that is very possible. It happens.

Q. Now, in the case of your maintenance of way employees, do the railroads normally abolish the jobs one at a time, or do they abolish them in groups, or just how is it normally done in the Maintenance of Way Department, in your experience?

Mr. McAfee: May I have that question again, your Honor?

The Court: Yes. Repeat the question, Mr. Buckley.

(The last question was thereupon read by the reporter.)

Mr. Davis: I think I will object to it on the ground [fol. 52] there has been no foundation laid, your Honor, for the question. In fact, there has been no foundation laid for a lot of these questions that have been asked.

What happens generally, I don't believe is applicable to this particular situation.

Mr. Mahoney: Your Honor, I expect to relate this to this particular situation, but I think that it is important to point out what happens in the industry and then what will happen on this railroad.

These things—there have been job abolishments on this railroad before, and Mr. Crotty is thoroughly familiar, personally familiar, with what happens to employees on these two railroads as a result of these job abolishments.

I intend to relate them directly to these two railroads, but I thought it would be of more value to the Court to get a general picture first.

The Court: On the representation by counsel that he will connect it up, I will overrule your objection.

A. To answer the question, job abolishments have taken place in both forms. There have been instances when jobs have been abolished singularly and other instances where jobs have been abolished in groups.

And, when a job is abolished singularly, the individual [fol. 53] exercises his seniority as I have previously related, and then that individual whom he displaces, displaces another junior employee, and down at the bottom

of the ladder the individual who doesn't hold enough seniority to remain in service is out of service.

Q. Now, this bumping process can affect a few or a great number of employees; is that right?

A. Yes. There is no way to determine precisely how many moves might be involved. It is just the operation of seniority.

Q. So that when there are a number of jobs abolished, all these employees then bump all other employees and it continues down through the entire line?

A. That is what happens.

Q. Then the youngest on the seniority roster in form of service are then deprived of their employment; is that correct?

A. That is correct.

Q. Now, with regard to the two railroad defendants in this particular case, during your experience as the President of this organization and as the assistant to the President of this organization, have you any personal knowledge as to any job abolishments which have taken place on these two railroad defendants?

A. Oh, yes.

Q. In the past?

A. Yes. There have been a number of job abolishments in the past.

Q. Now, has the result to employees on these two [fol. 54] railroads been exactly the same—

Mr. Davis: (Interposing) Wait a minute. I am going to object. This is a leading question—

Mr. Mahoney: (Interposing) Very well.

Mr. Davis: (Continuing) —if the Court please.

Mr. Mahoney: I will withdraw it.

Mr. Davis: I was thinking Mr. Mahoney has been leading the witness, and I have not objected to the present time, but it seems to me he should let the witness testify.

By Mr. Mahoney (continuing):

Q. What has happened to employees on the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company represented by your organization

under the contracts maintained by your organization with these railroads? What has happened to these employees in the past when jobs have been abolished?

A. They have exercised their seniority as they are entitled to do under the contracts. They have displaced junior employees. Junior employees, in turn, have displaced other junior employees. And, in the end result the junior employees on the seniority districts were deprived of jobs.

Q. Now, you are familiar with the contracts now in effect?

A. Yes, sir.

Q. Will that same thing happen to employees on the Erie [fol. 55] and the DL if jobs are abolished under this merger?

Mr. Davis: I object to that because we don't have the contracts in evidence, and he is interpreting the contract.

The Court: May I have the question again Mr. Buckley?

Mr. Brand: May I ask whether the contract is in the courtroom, or copies of it? Do you have copies of it?

Mr. Davis: No, I do not have copies of the contract.

The Court: May I have the question?

(The last question was thereupon read by the reporter.)

The Court: I will overrule the objection.

A. Yes, the same thing will happen.

By Mr. Mahoney (continuing):

Q. Mr. Crotty, are you familiar with the conditions which the Commission imposed in the merger case, in this case, regarding employees, the so-called New Orleans conditions?

A. Yes, I am.

Q. Do these conditions protect an employee from this bumping effect which you have described as happening upon the abolishment of jobs?

A. No, they do not.

[fol. 56] Q. When do the conditions, these employees protective conditions, the New Orleans conditions, when do they become effective?

A. They become effective when an individual is adversely affected insofar as earnings are concerned as a result of job loss through merger or consolidation.

Mr. McAfee: Your Honor, this gentleman is now interpreting a decision of the Federal Court. I earnestly submit he is not qualified to do that.

The Court: It has only been identified here with New Orleans. It might be the Federal Court; it might be a night club down there. I don't know what it is.

Mr. McAfee: I will assure your Honor it is a decision of a Court, a special Court in New Orleans.

The Court: It was mentioned in some of the pleadings here, or some of the exhibits.

By Mr. Mahoney (continuing):

Q. For the—

The Court: (Interposing). What is the citation?

By Mr. Mahoney (continuing):

Q. For the clarity of the record here, Mr. Crotty, would you explain what the New Orleans conditions are? The Commission has imposed them in this proceeding when it was before it.

Mr. Davis: I am going to object to that because the New Orleans conditions were laid down by the Interstate Commerce Commission in, I think, 282 ICC.

The Court: Is there a Federal Court decision on that?

Mr. Davis: And that went to the Federal Court later on.

Mr. McAfee: It went to the Supreme Court, your Honor, and that has been cited to you.

Mr. Mahoney: Your Honor, the Supreme Court, the only decision involving these so-called conditions involved the New Orleans Union Passenger Terminal case before the Supreme Court.

The Commission imposed a certain type of condition in 1950 which expired at the expiration of four years from the date of its Order.

The Railway Labor Executives Association took the position that since no employees were going to be affected

in their employment at all during this four-year period because the station was under construction and they would only be affected after the station became operative, that something more than a four-year period of protection was necessary.

They agreed—the Supreme Court said that was true, and it went back to the Commission, and the Commission drafted these conditions which I have here, which I will be very happy to put into the record, and they drafted them and [fol. 58] they imposed them; and they have been, since 1950, called the New Orleans conditions.

It is a formula of compensatory protection for employees affected by merger or any other situation arising under Section 5 (2).

The decision of the Court has never interpreted what these conditions do. The Commission drafted the decision.

The Court: Their objection is that a lay person is interpreting a decision of a Federal Court, and, if you have the determination by the Federal Court, that would seem to obviate the need for the objection.

Mr. Mahoney: Actually what I asked Mr. Crotty is if he was familiar with the New Orleans conditions.

Now, the New Orleans conditions is a formula which the Interstate Commerce Commission drafted and imposed in the New Orleans case. It is nothing that the Supreme Court did, or any other Court; this is something the Interstate Commerce Commission did after the Supreme Court made a ruling as to its power under Section 5(2) (f), the requirements under that section.

The Court: I will take the answer to it, if he is familiar with the New Orleans situation.

Mr. McAfee: Would you like the citations, your Honor, in the special Court and the Supreme Court?

[fol. 59] The Court: Yes.

Mr. McAfee: 84 Federal Supplement 178, and 339 U. S. 142.

The Court: Thank you. Go ahead.

By Mr. Mahoney (continuing):

Q. You are familiar with these conditions, Mr. Crotty?

A. Yes, I am.

Q. Have you had any personal experience with them as they have affected the employees you represented in previous ICC cases?

A. Yes, I have.

Q. Now, in those cases has it been your experience that these conditions become operative before or after an employee exercises his seniority rights and moves—and bumps someone junior to him?

A. They do not become operative until after the employee exercises his seniority and has made a change.

Q. Now, still based upon your experience under these conditions, if an employee is forced to exercise his seniority rights and moves from one location to another, do these conditions, or do they not, require that his moving expenses be paid by the carrier?

A. They obligate the carrier to reimburse him for the cost of moving expenses insofar as the initial move is concerned.

Q. Now, after an employee has moved and his expenses have been paid, if he is forced to move again because of a [fol. 60] senior employee through other job abolishments that requires him to exercise his seniority rights and he has to move again, are his moving expenses paid under these conditions?

A. No, they are not.

Q. We are interested here in what happens to all of these people should this bumping process get into effect. What happens to the youngest man on the seniority roster, or the youngest men?

Mr. Davis: In the Maintenance of Way Department.

Mr. Mahoney: In the Maintenance of Way Department.

By Mr. Mahoney (continuing):

Q. What happens to them when the bumping process is commenced after jobs are abolished?

A. They are deprived of employment and are eligible for the protective conditions as laid down by the Commission.

Q. The compensatory conditions, the New Orleans conditions?

A. That is right.

Q. Now, what rights, when a man is furloughed and deprived of his employment as a result of this process, what rights of his are affected?

A. Well, his seniority rights become of no value to him because he no longer has a job. His fringe benefits that he might be entitled to under the contract, such as health and welfare protection, and hospitalization, life insurance, [fol. 61] would become inoperative.

His eligibility for, and his right to, an annuity at some future date might be jeopardized.

Q. What type of annuity do you speak of?

A. An annuity under the Railroad Retirement Act; an annuity to which he has contributed during the years that he has worked for the railroad.

The Court: You say his annuity might become in jeopardy. What do you mean by "might"?

A. Well, your Honor—

The Court: (Interposing) That means it might or might not, and that isn't much of a statement.

A. Well, your Honor, an individual who has worked for a railroad for ten years or more, even though he is furloughed, retains his rights at some future date to receive an annuity under the Railroad Retirement Act based upon his years of service with the employing carrier and his earnings during that period.

If his years of service are less than ten, then his account is transferred to Social Security and the annuity that he will receive some day upon retirement is substantially reduced below that that he would receive under railroad retirement. That is because the contributions to railroad retirement are substantially more than the contributions to Social Security.

[fol. 62] The Court: All right.

By Mr. Mahoney (continuing):

Q. Would this bumping process, exercise of seniority rights that you have described, occur if the Brotherhood

interpretation of the requirement of Section 5 (2) (f) is sustained?

Mr. McAfee: I object, your Honor, unless that interpretation is stated for the record, because I, for one, can't tell what they are asking this Court in their petition.

Just their interpretation is too vague, and it isn't set forth anywhere in the papers before the Court.

The Court: I will take the answer.

By Mr. Mahoney (continuing):

Q. Would you answer?

A. No. The—

Q. (Interposing) What would happen, then—so that counsel and the Court will know—under this interpretation? What would happen to an employee when a job is abolished?

A. Well, he would be provided with a position of a similar class under circumstances where he would not be adversely affected, and he would continue to be employed by the carrier at the wage rate he was receiving at the time the change took place.

Q. Would he—if the carrier moved work from one place to another, from point A to point B, would he—could he stay at point A and say, "The heck with it," or would he [fol. 63] have to move?

A. He would have the right to follow the work, the work that was moved as a result of the merger.

Q. He would have to move?

A. Yes, he would have to move.

Q. He would have to follow the work. When he got at this other location would he, under this interpretation, would he be required to—forced to bump anybody out?

A. No.

Q. Under these circumstances, wouldn't this create a surplus of jobs, men working in jobs that were not needed?

Mr. Davis: I object to this. I don't understand what he means "under these circumstances." I think it is too indefinite, your Honor please.

The Court: I will sustain the objection, unless you clarify the circumstances.

By Mr. Mahoney (continuing):

Q. I believe you just testified that an employee would, under this interpretation which the Brotherhood places on the Section 5 (2) (f), that the employment must be maintained for a period of four years after the merger as it was before?

A. That is true.

Q. That an employee would have to be given, if work was moved or abolished, or what have you, an employee would have to be given an equivalent job; is that correct?
[fol. 64] A. That is right.

Q. Now, assuming that there were ten jobs in a certain point and the carrier now has need for only nine at that point, the carrier under these circumstances would still have to employ ten men; is that correct?

A. They would employ ten men either at that point or on that seniority territory.

Q. Right. Now, suppose there were only really need for nine right today, would this create a burden on the carrier, a surplusage of employees to jobs?

A. The carriers, in their presentation to the Interstate Commerce Commission, said that attrition would readily take care of this problem.

The Court: This is as good a point as any for me to ask a question. To be absolutely honest, I don't know what is meant by the term "attrition" as it is used here, so I would like you to explain what is meant by jobs created by attrition.

By Mr. Mahoney (continuing):

Q. Would you explain that to his Honor?

A. Well, the term "attrition" as we use it in our railroad parlance would mean job losses brought about by deaths, retirements, discharge for cause, any normal turnover other than job abolishment or forced reductions.

It was indicated that the rate of attrition in the railroad [fol. 65] industry in this instance was about ten per cent per year of the employees.

Q. Do you know, sir, exactly how many employees that

your organization represents who will be—whose jobs will be abolished or relocated as a result of this merger?

A. No, I do not.

Mr. McAfee: Your Honor—I am sorry.

By Mr. Mahoney (continuing):

Q. Therefore, you don't know precisely—

Mr. Davis: (Interposing) He has answered the question, Mr. Mahoney. The answer was "No."

Mr. Mahoney: May I ask him another one?

Mr. Davis: Not on the same point, I don't think.

The Court: Wait a minute. I am running this courtroom—

Mr. Davis: (Interposing) I am sorry, sir.

The Court: (Continuing) —not you. I wish you would preserve a little decorum in that respect.

Mr. Davis: I am sorry. I apologize.

By Mr. Mahoney (continuing):

Q. You don't know precisely how many employees would be affected by this bumping process, therefore; is that correct?

Mr. McAfee: If the Court please, that is an attempt to have the witness retract his prior answer. He is attempting [fol. 66] to impeach his own witness, and it is an incorrect paraphrase of the prior question and prior answer.

Mr. Mahoney: Your Honor please—

Mr. McAfee: (Interposing) I ask that it be read, if there is any question about it.

Mr. Mahoney: I ask that the first question be read.

Mr. McAfee: Yes, the first question and answer.

The Court: All right, read the first question and answer.

The Reporter: (Reading)

"Q. Do you know, sir, exactly how many employees that your organization represents who will be—whose jobs will be abolished or relocated as a result of this merger?

"A. No, I do not."

Mr. Mahoney: The second question, then, was whether he knew, in the light of that first answer, whether he knew

how many employees would be affected by the bumping process which results from job abolishments or relocations of employment.

The Court: If he wouldn't know one, how could he know the other?

Mr. Mahoney: I just wanted to get that in the record, [fol. 67] because they are two different things.

A. The answer is the same. No, I do not.

By Mr. Mahoney (continuing):

Q. Could you tell us why you do not know that?

A. Well, we have attempted to establish what the effect would be on the employment of the Maintenance of Way Department in the various conferences that our representatives have had with the representatives of management of the Erie and the DL & W. In those conferences they were assisted by our Vice President from the—that serves that territory. But, to date, we have not been able to ascertain what the net effect will be of the merger insofar as our employment is concerned, or the effect insofar as job displacements are concerned.

If I may, I might add, Mr. Mahoney, that it is obvious to me that there are going to be adverse effects on our employees, and there will be jobs abolished, and there will be requirements that employees move and displace other employees, because the carriers have stated in their submissions to the Interstate Commerce Commission that certain branch lines, certain tracks, are going to be abandoned; certain facilities, certain yards, buildings, bridges, will no longer be in use.

So, obviously, the men who have built and maintained those bridges and buildings, tracks, down through the years [fol. 68] will no longer be employed; or, those particular positions will no longer be in existence.

OFFERS IN EVIDENCE

Mr. Mahoney: Your Honor, if I may, I might support that answer of Mr. Crotty's. I would like to introduce as an exhibit portions of this Exhibit H-48 that was identified

before the Interstate Commerce Commission, which is entitled, "Report on Economics of Proposed Merger," and prepared by Wyer, Dick & Co., of Upper Montclair, New Jersey, for the use of the railroads in presenting their case to the Interstate Commerce Commission.

I would like to introduce the portion of this report on economics entitled "Study No. I," which sets forth the common points which the Erie and the Lackawanna serve, and abandonments which will take place in the yards and so forth, at these common points..

And Study II, which sets forth the duplicate lines which will result and the abandonments which they claim in those two lines, duplicating lines..

Also, Study XVI, which sets out the number of—in the opinion of the carrier—the number of employes who will be affected and the ways in which they will be affected.

The Court: Do you have those particular parts of that book marked so that we can have it marked as an exhibit? [fol. 69] Mr. Mahoney: Yes, your Honor.

The Court: Have the book marked 2, and then 2-A and 2-B.

Mr. Davis: Could I be heard on this?

The Court: As soon as he gets it marked.

Mr. Davis: I was going to say I might save some time. I would not object to the entire exhibit going in.

The Court: That is what I was thinking.

Mr. Davis: The entire exhibit should go in rather than portions of it, and then you have the complete picture.

The Court: I agree with you.

Mr. Mahoney: I am perfectly agreeable to that.

The Court: Put the whole book in, and mark that 2, and the one study 2-A, and the other 2-B.

If you want to give that to the Court Reporter, he will mark it.

(A booklet entitled, "Erie Railroad Company, the Delaware, Lackawanna & Western Railroad Company. Report on Economics of Proposed Merger," was thereupon marked Plaintiff's Exhibit 2 by the reporter.)

(Study I of Plaintiff's Exhibit 2 was thereupon marked Plaintiff's Exhibit 2-A by the reporter.)

[fol. 70] (Study II. of Plaintiff's Exhibit 2 was thereupon marked Plaintiff's Exhibit 2-B by the reporter.)

(Study XVI of Plaintiff's Exhibit 2 was thereupon marked Plaintiff's Exhibit 2-C by the reporter.)

The Court: Exhibit 2 is admitted. That automatically admits 2-A, 2-B and 2-C.

What does Study XVI cover?

Mr. Mahoney: That is the one that has the number of jobs created by attrition; the employees to be affected by this overall.

The Court: I thought that was—all right.

Mr. Mahoney: Your Honor, I would like to call your attention for the moment to Exhibit 2-A, Study I of Exhibit 2.

As an example of the type of activity the carriers plan, they intend a concentration of freight yard operations and facilities at various points which will make possible, as they characterize it, certain major abandonment, and they list them.

And, in East Buffalo, for instance, they have listed:

(Reading):

"JX Yard: Entire yard and buildings.

"Old BSW Yard: Entire yard and buildings.

[fol. 71] "Eastbound Departure Yard: Entire yard and buildings.

"Eastbound Receiving Yard: Entire yard and buildings.

"North Yard: Entire yard.

"Repair Yard: Entire yard and buildings,"

and so forth.

So that we think this exhibit supports the statement of Mr. Crotty that he knows or the plaintiffs know, without being told precisely by the railroad what they are going to do, that there will be job dislocations and job abolishments to the employees represented by him as a result of the merger, and that is the purpose of that exhibit.

By Mr. Mahoney (continuing):

Q. Mr. Crotty, you have described what would happen when an employee exercises his seniority rights, the bump-

ing process, and so forth. Now, in your opinion, sir, having experience, having seen this happen for a period of many years, and having personal experience with it, in your opinion, would it be possible to restore these employes to status quo once these jobs are abolished and this change has taken place?

Mr. Davis: May I be heard on an objection on that, please?

The Court: Yes.

[fol. 72] Mr. Davis: First off, I don't think that it has been proven yet that any employes will be separated from service.

And, secondly, if they are separated from service, there has been no showing by Mr. Crotty that they will not have jobs available for them in their same seniority/district by reason of attrition or other cause.

It seems to me that it is pure speculation; it is not based on any fact.

The Court: Well, it is as much speculation one way as it is another. But this study, that I understand is here now as an exhibit, does make a computation of jobs to be abolished and jobs created by attrition of displaced employes.

So, if this was submitted to the Commission—and I don't know whether it was or not. I presume it was.

Mr. Davis: It was, sir. Exhibit 48.

The Court: (Continuing) —then doesn't this have any application to the action of the Commission? And, if it does, isn't this based on conjecture and surmise and guess-work?

Mr. Davis: It covers all organizations, your Honor please, and not merely the maintenance of way employes.

The Court: Regardless of that, it is something projected in the future.

[fol. 73] Mr. Davis: That is true, sir.

The Court: And these people, they apparently are drawing on the background of their experience with other railroads and other mergers.

Mr. Davis: That is right.

The Court: And I presume that is what this gentleman is doing. So, I think he is as competent in his field just the same as these people. I don't know. (That seems to present itself to me.

If there is any guesswork here, it is certainly guesswork over here (indicating).

Mr. Davis: All right.

The Court: So, what you are actually telling me is that the Commission was operating on the basis of a conjectural study made by somebody retained by the railroads.

Mr. Davis: That is correct.

The Court: I will overrule the objection.

Mr. Mahoney: Do you want the question repeated?

The Witness: I remember it, I think.

By Mr. Mahoney (continuing):

Q. All right.

A. It would be impossible, in my opinion, to put the men back where they belong if this original operation was permitted to come into being. It involves selling of homes, moving, taking families out of school, giving up community [fol. 74] lives that they have experienced for years.

I don't believe it would be possible to right the thing after it had once taken place.

Q. Mr. Crotty, are you a member of the Railway Labor Executives Association, the intervening plaintiff in this proceeding?

A. I am.

Q. Will you tell us, sir, who the—generally, who the members of this organization are?

A. The Railway Labor Executives Association is composed of the chief executive officer of each of the twenty-three standard railroad Brotherhoods.

Q. What, generally, does this association do with regard to its membership? What function does it perform for its members?

A. Well, we try to coordinate our activities, the activities of the twenty-three railroad Brotherhoods, to protect and promote the interest of the employees that are represented by those twenty-three organizations.

We engage in operations in the legislative field and in any area where we have things in common before any Government commission or tribunal.

Mr. McAfee: Your Honor please, I respectfully submit I don't believe this is relevant to the question before the Court.

Mr. Mahoney: I am just asking him to describe the general activities of this organization, which is a plaintiff, [fol. 75] too.

The Court: All right. I will overrule the objection.

By Mr. Mahoney (continuing):

Q. Have you any personal knowledge of the Association's participation in the Erie-DL merger when it was before the Interstate Commerce Commission?

A. I do.

Q. From your own personal knowledge, can you tell us whether the organizations whose chief executives are affiliated with the RLEA represents substantially all the employees of the Erie and the Delaware, Lackawanna & Western Railroad?

A. To the best of my knowledge, it represents all of the employees that are under contracts.

Q. From your own personal knowledge, do these organizations, do these other organizations on the Erie and the DL have, generally, the same type of agreements with those railroads as your own organization, with regard to seniority?

A. They are identical in principle. They may vary as to language.

Q. Now, under those agreements, then would the bumping process which you have described as taking place in the maintenance of way craft to employees you represent also take place in the other crafts of other employees of these railroads?

A. The net result would be the same. The effect would be the same.

[fol. 76] Mr. Mahoney: I have no further questions of Mr. Crotty. If your Honor or opposing counsel have any—

The Court: All right.

Mr. McAfee: If the Court please, I apologize for the way we have been jumping up all over the room.

The Court: All right.

Mr. McAfee: We did not realize a witness would be called here today.

May I suggest, so that we have some orderly procedure, that we have a short recess?

The Court: There hasn't been anything disorderly about it up to now.

Mr. McAfee: Thank you, your Honor.

The Court: The statute says the Court is required to make a finding, and I presume the finding I make is from some testimony.

Mr. McAfee: Well, it refers really—well, your Honor is correct in your recollection. But could we have a short recess to decide upon a spokesman?

The Court: All right. Of course, I don't care how many speak.

How much time do you want?

Mr. Davis: Five minutes is plenty.

The Court: All right, we will take a five-minute recess.

(A recess was thereupon taken.)

[fol. 72] Mr. Mahoney: If your Honor please, I mentioned that I had these New Orleans conditions, and I would be very happy to put them in evidence.

The Court: All right. Does anyone have any objection?

Mr. Davis: I don't believe I have a copy of them.

(A document was thereupon handed to Mr. Davis by Mr. Mahoney.)

Mr. Davis: I never saw them.

Mr. Mahoney: Is there an objection to it?

Mr. Davis: Will you give me one?

Mr. Mahoney: I will. I will be happy to.

Mr. McAfee: I don't know.

The Court: Why don't you wait and hand it around there.

Mr. Mahoney: I will hand it around. Yes, your Honor.

The other thing, there was some question about the agreements which this Brotherhood has with these railroads,

and these agreements, we have sent for them and they are on their way, and I would like to have them introduced as exhibits also, sir.

The Court: All right.

Mr. Mahoney: Thank you, your Honor.

[fol. 78] Cross examination.

By Mr. Taylor:

Q. Mr. Crotty, have you testified with some frequency over the years in coordination proceedings of one sort or another involving these two railroads—abandonments, or trackage right agreements, or proceedings of a nature that might result in displacement of jobs and the imposition of conditions?

A. You asked me specifically, sir, didn't you, proceedings involving these two railroads?

Q. Yes.

A. The answer is, "No, I have not."

Q. Have you testified in proceedings of this nature involving other railroads?

A. I have never testified in any proceedings before the Interstate Commerce Commission. I have been a party to conferences and discussions regarding other mergers and coordinations involving other railroads.

Q. Have you been a party to discussions involving the nature of the employee protective conditions which should be imposed in a proceeding where they would be appropriate?

A. Yes, I have.

Q. Prior to this case has your Brotherhood advocated the type of protective condition which has been advocated here?

A. Yes, we have.

[fol. 79] Q. Do you have a particular proceeding in mind?

A. Yes, I do. The merger of the Norfolk & Western, and the Virginian Railways.

Q. Now, in that merger the protective conditions which are akin to the conditions which you are advocating in this proceeding were the result of a stipulation or agreement between the railroads and the employee organizations, were they not?

A. That is correct.

Q. They were not imposed by the Commission?

A. Only after stipulation.

Q. In fact, the Commission, on its own, imposed the so-called New Orleans conditions, did it not?

A. That is correct.

Q. Generally speaking, in the past, have not the labor organizations been rather completely satisfied, or at least have agreed to the imposition of conditions like the Oklahoma or New Orleans conditions?

A. Well, we have never been faced with the magnitude of the situation such as we are now confronted with; the mergers that are already in being and those that are contemplated.

The Court: I don't think that answers the question. Will you read the question, Mr. Buckley?

(The last question was thereupon read by the reporter.)

[fol. 80] A. I will have to say that we have never been completely satisfied.

By Mr. Taylor (continuing):

Q. But you have accepted those conditions?

A. We have.

Q. And, as a general rule, proposed such conditions; is that not true?

A. In certain instances we have, yes.

Q. And this practice or course of conduct has existed over many years until just recently; is that not correct?

A. That is true.

Q. I mean, these New Orleans or Oklahoma conditions involve conditions which are usually and normally imposed with the agreement of the labor organizations in proceedings involving the displacement or potential displacement of employees for a number of years; isn't that correct?

A. That is true insofar as the limited number of proceedings are concerned that have taken place.

Q. But, as I understand it, it is your position that we are entering an era whereby mergers may be more frequent

than they have been in the past ten or twenty years and that this has brought about a re-evaluation of the types of protective conditions which would do the job and have led you people to now take the position that you would need conditions which would substantially freeze the employment situation for a period of four years? Is that a correct summary of your thinking today?

A. That is, I think, very properly quoted.

Q. Now, the statute itself hasn't changed so far as Section 5(2) (f), which is the statutory provision we are concerned with, since 1940, has it?

A. No, it has not.

Q. But, today, your fresh look would indicate to you people that that statutory provision requires the imposition of conditions which would freeze the employment situation for a period of four years; is that correct?

A. Yes, that is correct. We have problems today that we have never had before, and that is what we are trying to solve.

Q. Is it your position that the Commission has discretion to impose the type of conditions which are represented by the New Orleans conditions, or the type of conditions which you are urging in this proceeding, or is it your position that the Commission is required to impose the type of conditions which you are urging here?

A. We feel the Commission is required to impose the type of conditions we are urging.

Q. And that over the past fifteen or twenty years the Commission, in fact, has not properly discharged its duty under the statute?

A. We feel they have imposed—

[fol. 82] Mr. Brand: (Interposing) We object to that, if the Court please. We are not in a position to condemn the Commission.

The Court: I was wondering, Mr. McAfee objected to a question, and the basis of his objection was that the witness was being called upon to interpret the Federal Court's determination, and you are asking him to interpret a statute.

Mr. Taylor: I will withdraw that question, your Honor.

The Court: One minute he is a lawyer and the next minute he isn't.

All right.

Mr. Taylor: I think that is all the questions I have.

Cross examination.

By Mr. Davis:

Q. Mr. Crotty, you are familiar, are you not, with the proceeding which the Lackawanna and the Erie brought to coordinate and consolidate their facilities between Binghamton, New York, and Gibson, New York?

A. Yes, I remember the proceedings.

Q. And that was Finance Docket No. 19989 before the Interstate Commerce Commission?

[fol. 83] A. I believe that is correct.

Q. And didn't that involve a large discontinuance of trackage on the Lackawanna?

A. I wouldn't classify it as large, sir, as compared to the present situation that is under discussion.

Q. Well, eventual abandonment of trackage and a lifting of the second line between other points, was it not?

A. It involved approximately 50 employes that were represented by my Brotherhood, if my memory serves me correctly.

Q. And in that proceeding your organization, the Railway Labor Executives Association, stipulated the New Orleans conditions, did they not?

A. That is true.

Q. Thank you. That coordination took effect on August 31, 1959; is that correct?

A. I have no reason to dispute the date.

Q. Now, Mr. Crotty, do you know whether any employes of the Lackawanna or the Erie are represented by the Transport Workers Union?

A. There is a possibility that a handful of those working at the dock might be represented by the Transport Workers.

Q. Do you know whether any of the employes of the Lackawanna or the Erie are represented by the United Mine Workers of America?

A. No, I didn't know that.

[fol. 84] Q. Do you know whether any of the employees of the Lackawanna or the Erie are represented by the Teamsters Union?

A. I do not know.

Q. Do you know whether or not any of the employees of the Lackawanna are represented by the Railroad Patrolmen's International Union?

A. I presume a few were.

Q. In other words, they represent our policemen; is that correct?

A. They generally take on all railroads.

Q. And they are not a member of the Railway Labor Executives Association?

A. No, they are not.

Q. Or any of the other organizations I have mentioned?

A. No, they are not.

Q. Do you know whether any of the employees of the Lackawanna or Erie are represented by the National Maritime Union?

A. No, I do not know.

Q. And that organization is not a member or affiliated with Railway Labor Executives Association?

A. No, they are not.

Q. Do you know whether or not any of the employees of the Erie or Lackawanna are represented by the Lighter Captains Union, Local 996, ILA?

A. No, I do not.

[fol. 85] Q. They are not represented by Railway Labor Executives Association?

A. No, they are not.

Q. Will attrition, as you have defined it, take care of all of the employees you represent, your organization represents, as the bargaining agent of the Lackawanna and Erie?

A. Well, if the degree of attrition as presented by the carrier before the ICC were permitted to function over a relatively few years, if that degree is correct, I would think that attrition would take care of it within a few years.

Q. And, Mr. Crotty, when a man is affected by a forced reduction and goes on the furlough roster, he still retains his seniority date, does he not?

A. He retains it for a stipulated period of time.

Q. And how long is that stipulated period of time?

A. It varies from one railroad to another, and from one class on a given railroad to a different class on a given railroad.

Q. Let us talk about the Erie, Lackawanna—as long as they are involved in this proceeding. What stipulation of time is on the Erie, Lackawanna, if you know?

A. I do not want to be precise about it, because I cannot be. We have over 400 different contracts that we are now policing and generally those periods of protection are from one to two years.

Q. But you don't know what the period of protection is [fol. 86] on the Erie or Lackawanna under the contract?

A. I couldn't give you the protective period for each class of employees on each railroad, no.

Q. Thank you. But if a force is increased following a forced reduction, and the increase occurs during the period of time, whatever it may be, men are returned to employment on the basis of seniority, are they not, from the furlough list?

A. That is true.

Q. And if there is a forced reduction because of economic conditions, does not the—do not the junior men then go on the furlough list, as you have described?

A. Yes, they do.

Q. So you have the same process, and I understand it, on a forced reduction because of economic conditions as you have from a forced reduction because of coordination, consolidation or merger?

A. The effect on the individual employees is the same.

Mr. Davis: Thank you very much.

Mr. Mahoney: Your Honor, are there any other questions? I have a few questions on redirect.

Mr. Davis: I think I have one more question.

The Court: All right.

By Mr. Davis (continuing):

Q. If a person goes on a furlough list by virtue of being bumped as a result of merger, then the junior employee [fol. 87] on the furlough list would receive the benefits to which he would be entitled under the New Orleans conditions as presently prescribed by the Interstate Commerce Commission?

A. Yes.

Q. But if he went on the furlough list because of economic conditions, he would receive nothing?

A. That is right.

Mr. Davis: Thank you, sir.

Redirect examination.

By Mr. Mahoney:

Q. Mr. Crotty, Mr. Taylor asked whether you had ever brought up this issue of preservation of employment before. You said you had in the New Orleans case—I mean, excuse me—in the case of the Norfolk & Western and Virginian merger. Now, I am not quite sure it was clear, but Mr. Taylor said that the Commission also imposed the New Orleans conditions.

Now, do you know, from your own knowledge, from reading the Commission's decision or otherwise, to whom or whom the Commission stated in its Order these New Orleans conditions were intended to protect in that connection?

A. If I recall the Commission's Order, the New Orleans conditions that were specified as an alternative were to apply to employees who were not adversely affected as a result of the merger.

[fol. 88] Q. Were they to cover employees who were already covered by the Norfolk & Western agreement or were they to cover employees who were not covered by that agreement?

A. I don't believe I understand your question correctly, Mr. Mahoney.

Q. The situation seems to be this: that the Railroad Brotherhood and the Norfolk & Western and Virginian

agreed by contract to preserve employment as a result of this merger and let attrition take its course?

A. Yes, sir.

Q. Normal attrition. All right. Now, they also—the Commission recognized this agreement, and they also imposed the New Orleans conditions?

A. Yes.

Q. Now, do you know whether they imposed these conditions on top of the Norfolk & Western agreement, or whether they imposed them to protect employees who were not covered by the Norfolk & Western conditions?

A. They imposed them to protect those who were not covered by the so-called Norfolk & Western and Virginian agreement.

Q. Thank you. Now, Mr. Taylor also referred to freezing employment.

Now, is it your position that the interpretation which your organization, the RLEA, has placed on Section 5 (2) (f) means that these jobs, these two thousand jobs that [fol. 89] the railroad in its Exhibit 2-C has stated that it wants to abolish over a period of five years, that they could not abolish those jobs? Is that what that so-called freeze means?

A. That is not a job freeze; as such. Economic conditions could reduce that number to whom the guarantee applied.

Q. Could the attrition rate, as it occurs, also reduce, cut back the number of jobs by two thousand over a period of five years if the carrier wished to do it?

A. Yes, it could.

Q. So that this condition of freeze is really an employment freeze for present employees?

A. It is a starting point.

Q. It would not prevent the railroad from abolishing jobs?

A. No, sir.

Q. Now, Mr. Davis said that the Railway Labor Executives Association and you agreed, had entered into a stipulation agreeing to these New Orleans conditions in a case involving the Erie and DL, at Hoboken, and another one I believe up in Elmira; is that right?

Mr. Davis: Not Hoboken.

By Mr. Mahoney (continuing):

Q. He did not mention the one at Hoboken, but he mentioned the one at Elmira.

Was this activity which took place, this case before the Commission, was that a railroad merger?

[fol. 90] A. No, it was not.

Q. As a matter of fact, have there been, to your knowledge, very many large railroad mergers in the past twenty years?

A. I am just aware of the one that was discussed here today, the Norfolk & Western and Virginian.

Q. Now, Mr. Davis also mentioned to you a number of unions and asked whether or not you knew whether they represented employees of these railroads. Were any of these unions which he mentioned, were any of them, or are any of them, a member through their chief executive of the Railway Labor Executives Association?

A. No, none of them are members of RLEA.

Q. Now, Mr. Davis also indicated that attrition would take care of these employees under the exhibit that he put in, their plan; the attrition rate would take care of them; the attrition rate and the New Orleans conditions. But would the attrition rate and the New Orleans conditions prevent these locations, dislocations of employment, bumping that you described, and so forth?

A. No, they would not.

Mr. Mahoney: I believe that is all. Thank you.

The Court: Any recross?

Mr. Taylor: Yes, your Honor. I would like to ask a question.

[fol. 91] Recross examination.

By Mr. Taylor:

Q. Mr. Crotty, if the whole problem of the changes in the employment situation as a result of merger were not taken care of by this attrition, then under the conditions imposed by the Commission, if various jobs on the railroads are abolished, through abandonments or what have

you, so that for certain employees there is no longer a job for him to go to, under the New Orleans conditions such employees would receive benefits which, in general, would entitle them to the equivalent of the salary they had received on the job, reduced by whatever sum they may earn in some other job that they might subsequently secure; isn't that correct?

A. Insofar as compensation is concerned, that is correct.

Q. It is intended to see that the employee is not hurt in the pay check while making whatever changes are necessary due to the change in his job situation; isn't that correct?

A. You mean the New Orleans conditions, sir?

Q. Yes.

A. Yes, that is the way it has applied.

Q. Now, the conditions that plaintiff would urge that should be applied would require that if certain jobs are abolished as no longer necessary, that, nonetheless, the men who had held those jobs would still be entitled to come to work to be employees, with no job to occupy them during [fol. 92] their tour of duty? Isn't that a likely result?

A. Well, I would hope that the attrition would take care of it, preserve the jobs, and there wouldn't be any men coming to work who wouldn't be needed.

Q. If attrition does not solve the problem, what you would have would be men who had occupied jobs which no longer exist coming to work with no jobs for them to do; isn't that correct?

A. I would have to say that if there was no work for them to do, that would be the result. I feel that 5 (2) (f) requires that their jobs be maintained; their employment be continued.

Q. You say you feel 5 (2) (f) requires the job to be maintained. Just what do you mean by that?

A. That they not be placed in any less favorable position with respect to employment.

Q. By "job being maintained," do you mean that the particular job cannot be abolished for four years?

A. Not the particular job. But the individual should be—as we interpret 5 (2) (f) we feel it requires the car-

rier to continue that individual in his position or in a comparable position until such time as your attrition takes care of what might be an excess number of employees.

Q. But, if you have had a merger involving abandonments of lines and a streamlining of facilities such that duplicating facilities are eliminated, consequently certain [fol. 93] jobs which the duplicating facilities made necessary are also eliminated, then you would have the man coming to work where his job—there was no longer a necessity for that particular job; isn't that so?

A. That, undoubtedly, would be true. What we would hope is that the work would be transferred to some other point and the individual would be permitted to follow his work.

Q. Do you think it would make for good employee morale, or that it would be at all a desirable employer-employee relationship, if the result of a merger would be that a certain number of men had to be permitted to come to work to hold a quote "job" unquote when the job which they had been doing had been eliminated?

Mr. Brand: I object to the question as incompetent, irrelevant and immaterial. If Congress has said something, must be done, that is for the Courts to enforce, and that is not the issue here today. What he thinks about what should be done or shouldn't be done isn't important; it is what is the effect of—should the status quo be preserved.

The Court: If what he says isn't important, what has he been doing up here for the last hour and a half?

Mr. Brand: No. No.

The Court: I am under the impression he has been submitted here as an expert, because Mr. Mahoney asked [fol. 94] his opinion.

I will overrule your objection.

Mr. Taylor: Did you understand the question?

A. I understand the question, and I would like to answer it in this way; certainly we are realistic enough to realize that the industry isn't going to employ a lot of people that they have absolutely no use for. And, if I may, I would like to continue just a little bit:

In recognition of this fact, we knew this merger was being contemplated; it has been discussed with our representatives for years; and—I mean over one year, a couple of years. We have even proposed to the Erie management that they would be far-sighted enough here two years ago to recognize that this problem was going to exist if and when this merger come into being, and we tried to discuss with them at that time about an agreement which would provide for attrition to take effect a couple of years ago so we wouldn't be faced with this problem here today. But we were not successful.

Mr. Taylor: I think that is all. Thank you.

The Court: We will take a recess at this time. If you have any further redirect, you may ask him after recess. I have a few other matters to take up at this time.

(A recess was thereupon taken.)

[Vol. 95]. The Court: All right.

Mr. Mahoney: Your Honor please, we have now the copies of the agreements which the Brotherhood of Maintenance of Way Employees has with the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company.

The Court: Do you want to have them marked?

Mr. Mahoney: Yes, sir. We have one agreement between the Delaware, Lackawanna & Western Railroad Company and the Brotherhood of Maintenance of Way Employees.

(A booklet entitled, "Agreement Between The Delaware, Lackawanna & Western Railroad Company and Brotherhood of Maintenance of Way Employees, effective July 14, 1941," was thereupon marked Plaintiff's Exhibit 3 by the reporter.)

Mr. Mahoney: There are three agreements between the Erie Railroad Company and the Brotherhood of Maintenance of Way Employees. One agreement covers crossing watchmen, drawbridge engineers, and drawbridge tenders.

(A booklet entitled, "Agreement Between Erie Railroad Company and the Trustee of the Property of the New

Jersey and New York Railroad Company and the Crossing Watchmen, Drawbridge Engineers, and Drawbridge Tenders Employed Thereon represented by the Brotherhood of Maintenance of Way Employees governing Hours of Service [fol. 96] - i.e., Working Conditions and Rates of Pay, effective July 1, 1951," was thereupon marked Plaintiff's Exhibit 4 by the reporter.)

Mr. Mahoney: A second agreement between the Erie and the Brotherhood of Maintenance of Way Employees covering bridge structures employees. This agreement, I might state, your Honor, is the only copy we have and, if we may be permitted to do so, we would like to make a copy of it and submit the copy in the record.

The Court: All right.

(A document entitled, "Agreement Between Erie Railroad Company and Department of Structures' Employees represented by Brotherhood of Maintenance of Way Employees, effective February 1, 1946," was thereupon marked Plaintiff's Exhibit 5 by the reporter.)

Mr. Mahoney: And the last agreement is between the Erie and the Brotherhood of Maintenance of Way Employees covering all other maintenance of way employees on that railroad.

(A booklet entitled, "Agreement Between Erie Railroad Company and Trustee of the Property of the New Jersey and New York Railroad Company and the Employees Thereon represented by the Brotherhood of Maintenance of Way Employees governing Hours of Service and Rates of Pay, effective January 1, 1952," was thereupon marked Plaintiff's Exhibit 6 by the reporter.)

[fol. 97] Mr. Davis: Do you intend to furnish us with a copy of these agreements?

Mr. Mahoney: I think the railroads have copies.

Mr. Davis: We don't have them with us.

Mr. Mahoney: We have no other copies of these, and we would be happy to submit them subject to objection, if you have any, to the contents of them.

The last exhibit which I would like to introduce is the so-called New Orleans conditions. It is that portion of the Opinion of the Commission in the New Orleans case which specifies the protection provided for employees in that case.

(A booklet containing the Washington Job Protection Agreement of May, 1936, etc., was thereupon marked Plaintiff's Exhibit 7 by the reporter.)

Mr. Mahoney: I might add, your Honor, the pamphlet which has been marked containing the New Orleans conditions also contains all other types of protective conditions which the Commission imposes in various mergers, abandonment cases, and so forth.

The Court: What exhibit number is that last one?

Mr. Mahoney: 7, your Honor.

The Court: What about the contracts? Does anyone [fol. 98] have any objection to the exhibits—

Mr. Davis: (Interposing) If Mr. Mahoney assures me they are the contracts, I will take his word. I don't have anything to check them against here, but I assume they are the contracts presently in force.

Mr. Mahoney: They are the contracts presently in force.

The Court: They are all admitted.

Mr. Davis: As far as the New Orleans conditions are concerned, I took a quick look at it, your Honor. It contains other statements in there, and it would seem to me that the report of the ICC which lays down the New Orleans conditions contains everything and that this exhibit is surplusage because it does not contain all of the language of the Interstate Commerce Commission.

If it is accepted as a partial quote from the Commission's decision, and we understand that the Commission's decision is controlling, I have no objection to it going in, in this particular form.

Mr. Mahoney: It does not contain the facts of the case, your Honor; it does not contain some of the introductory statement; but it does specifically contain the particular protection which is afforded. That is in that excerpt.

The Court: Does anyone have any objection?

[fol. 99] Mr. Taylor: We have no objection, your Honor, as long as it is, of course, understood that the Commission's

report in the New Orleans Union Passenger Terminal case at 282 ICC 271 is a published official report of the Commission and of the Government, if there is any discrepancy.

The Court: All right.

Mr. Taylor: That is the published report which does contain it.

The Court: With that qualification, it is admitted.

Mr. Mahoney: I believe counsel for the opposition had finished with Mr. Crotty. Is that correct?

I have no questions on redirect, your Honor. If you have any—

The Court: Mr. Crotty, you indicated by your testimony that your union and the other unions that make up the RLEA have changed their attitude in relation to the matter embraced by the statute here under consideration. What are the conditions that brought about that change of attitude insofar as you are concerned, that you have personal knowledge of?

A. Well, the tremendous number of mergers that are now pending or are under discussion, your Honor.

The Court: What do you mean by "tremendous number"?

[fol. 100] A. Well, at the present time mergers are being contemplated, and in some instances applications actually filed for approval in several instances, which I could name if that would be interesting. For example, the—

The Court: (Interposing) No, I don't want any of the names. Just numerically. You say, "a tremendous number," and I am interested in what you mean by "a tremendous number."

A. At the present time, mergers affecting over—affecting approximately four to five hundred thousand railroad employees are under discussion.

The Court: And with plans in contemplation for mergers involving that many employees of railroads, what in your opinion would be the effect of the applications if they were granted; in the event all applications were made and granted?

In other words, how does this particular condition affect your particular group?

A. Insofar as our particular group is concerned, it has been our experience in mergers or consolidations that twenty-five to thirty-five per cent of our people lose their jobs.

The Court: What is your experience in relation to any employee of your group that was working for one railroad that was relieved of his job with any particular [fol. 101] railroad? Does he look for employment with another road?

A. He does, your Honor, but in the last seven to eight years employment in the railroad industry has been reduced by four hundred thousand people, so his chances of finding a job are not very good.

The Court: Then he would have to go out in the open labor market and find employment; is that it?

A. He does, and his particular skills are not adaptable readily to work in the outside labor market.

The Court: I have nothing further.

Mr. Taylor: No further questions.

Mr. Davis: I would like to ask a question.

Recross examination.

By Mr. Davis:

Q. Mr. Crotty, in answer to the Court, you said that four hundred to five hundred thousand employees were involved in mergers under discussion?

A. Yes, sir.

Q. Is that correct?

A. I estimate that is approximately the number.

Q. And you do not know, do you, how many of those mergers under discussion will actually be consummated?

A. I do not.

Q. So what you are saying is that—you are taking a hypothetical situation?

[fol. 102] A. I am.

Q. And the reduction in employment of four hundred thousand employes that you have referred to results from two situations, does it not—from mechanization and from economic conditions?

A. Well, those are two of the factors. There are also others, such as—again I am giving you my opinion.

Q. Yes. But mechanization of track equipment could account for a substantial reduction in employment of track labor, could it not?

A. Yes.

Q. Irrespective of mergers?

A. It is substantial, yes.

Q. Mr. McAfee seemed to think you referred to some prior mergers. What mergers were you referring to?

A. Well, specifically, the merger that we refer to as the New Orleans Passenger case that involved seven railroads operating into the south of New Orleans.

Q. That was a coordination, was it not, sir?

A. Well, if we are drawing a line of difference between a coordination and a merger, yes.

Q. And that was a coordination similar to the coordination which took place at Hoboken, New Jersey, between the Erie and the Lackawanna in the latter part of 1956 and first part of 1957; is that correct?

A. It is similar in principle, although the one in New [fol. 103] Orleans was of greater magnitude.

Q. But the Lackawanna, Erie-Hoboken coordination involved a number of your employes, did it not?

A. Yes, it did.

Q. And in that connection your organization and the Railway Labor Executives Association stipulated the New Orleans conditions, did they not?

A. We did. It was an isolated instance.

Mr. Davis: Thank you very much.

Redirect examination.

By Mr. Mahoney:

Q. If I may clarify one point: you do have knowledge, do you not, Mr. Crotty, of the fact that a number of rail-

roads have announced publicly that they are going to merge? Other railroads have now pending before the Interstate Commerce Commission applications seeking approval of mergers? Is that correct?

A. Yes, that is correct.

Q. With your knowledge on that, would you tell us, in your opinion, how many employees would be affected by those mergers which have already been applied for or which have already been publicly announced; not just a hypothetical thing that might happen?

A. You said, had already been applied for or had been announced?

[fol. 104] Q. Publicly, yes. That they were going to, but maybe they haven't actually filed an application with the Commission.

A. I don't know just what category Mr. Mahoney, to put mergers that are under discussion, such as the New York Central, B & O, and C & O. I don't know.

Q. Do you know if they have applied?

A. They have not applied.

Q. Has the B & O and C & O applied?

A. Not to my knowledge.

Q. There was also a distinction made between coordinations of facilities and mergers. Now, is the actual—normally, from what you have seen in this case, and what normally happens in the coordination cases, like the New Orleans case to which you referred, is the effect on employees in mergers between two large railroads greater or less than in coordinations?

A. I think the net result is the same.

Q. To the individual.

A. Yes.

Q. But I am talking about numbers of employees. Are there usually more or less affected by mergers of railroads than by a coordination of facilities in particular places?

Mr. Davis: He has answered the question.

A. A lesser number is involved in a merger as opposed to a consolidation, generally. That is the way I interpret [fol. 105] the term. Someone else might disagree with me.

By Mr. Mahoney (continuing):

Q. Would you—I don't quite understand you. There are particular coordinations of facilities in every merger; is that correct? Is that your understanding?

A. Let's take examples, Mr. Mahoney, if you will, please.

Q. All right.

A. For example, the operations, the station activities in a given town, where it previously had two stations, two agents, two baggagemen or staffs, they could be put together; one facility would serve both railroads; and I suppose in your terms that that would be referred to as a consolidation of those two facilities.

Now, I am not a lawyer, and in our everyday language we say that that facility—those facilities were either consolidated or merged.

So I am using the terms synonymously.

Q. When I say "merger," of course I am talking about putting two entire railroads together. When I talk about "consolidation," I am talking about particular facilities of two railroads.

On that basis of definition, would your answer be the same?

Mr. Davis: Just a moment. I think I am going to object. It seems to be Mr. Mahoney is trying to impeach his own witness. He got an answer, and I think his question is fully [fol. 106] answered, your Honor.

Mr. Mahoney: Your Honor, I think it is obviously—

The Court: (Interposing) I don't think he is trying to impeach his own witness. I think he is trying to have the witness' answers clarified for his own edification.

The witness, in my opinion, is unusually frank, and I don't think there is anything that will be brought out here that would in any way be upsetting to anyone.

Mr. Mahoney: I just wanted to clarify the definition as Mr. Crotty and I understand it to make sure we are talking about the same thing when we say "merger" and when we say "consolidation."

A. If you are using the term "merger" as applying to putting together two separate properties, obviously more

people are affected as a result of a merger than they are a consolidation, if the term "consolidation" is limited to individual facilities or properties.

By Mr. Mahoney (continuing):

Q. That was the import of my question.

Now, will you answer me this: does your estimate of five hundred thousand employees that you have mentioned as affected by mergers under discussion include, to your knowledge, any mergers that are merely hypothetical and [fol. 107] haven't been publicly announced as the intent of these railroads?

A. Yes. There are some that have—that are in the talking stage, the discussion stage. There are others, of course, where the applications have been filed.

For example, some of the chief executives met with the presidents of the Northern Pacific, the Great Northern, and the Burlington Railroads here in Chicago the other night to discuss with them their thoughts in connection with a merger or a consolidation of those properties, using your term as a merger.

Q. Thank you. And you would consider that under the classification of "hypothetical" at the moment?

A. Well, no one knows what the net result will be, but they have announced their intention to merge if other obstacles can be overcome.

Mr. Mahoney: I have no more questions. Thank you, your Honor.

The Court: Anything further?

Mr. Taylor: No questions.

The Court: That is all, Mr. Crotty.

(The witness was thereupon excused.)

[fol. 108] Mr. Mahoney: Your Honor, we have no further evidence to introduce, and we would like to ask if the railroads have any; and, if they have not, we would like to be heard in argument.

Mr. Taylor: The Interstate Commerce Commission and the United States have no witnesses to present, nor any evidence to present.

The Court: Any of the other parties in interest?

Mr. Davis: Neither the Erie Railroad or Lackawanna have any witnesses or any evidence to submit. Except the affidavit, I assume, will be considered.

The Court: Yes. That is your affidavit.

Mr. Davis: That is my affidavit, sir.

The Court: All right. Well, you may proceed to your argument.

ARGUMENT BY MR. MAHONEY ON BEHALF OF PLAINTIFF

Mr. Mahoney: If it please the Court, I have a memorandum which I have prepared—(Handing document to the Court and opposing counsel)—on the argument of the Temporary Restraining Order which has in it some of the argument on the merits, which I do not believe are in issue here. It is not argument which the representatives of the ICC and the railroads are unfamiliar with. It is the same type of argument which was presented to the ICC in this merger proceeding before them.

[fol. 109] If the Court please, I think we are—

Mr. McAfee: (Interposing) Your Honor, before we go ahead, could we get the papers straightened out? We seem to have three different types of papers that Mr. Mahoney has handed to us.

(A discussion was thereupon had off the record.)

Mr. Mahoney: If the Court please, we are here today merely to determine whether or not this Court should grant a Temporary Restraining Order pending a hearing on an interlocutory injunction—later, on the merits perhaps—of the petition that the complainants have maintained in this case.

[fol. 110] ORAL RULING GRANTING MOTION FOR
TEMPORARY RESTRAINING ORDER

The Court: I am going to grant the motion for the temporary restraining order on the basis of testimony adduced by the plaintiff through the person of Mr. Crotty, who is presently President of the Maintenance of Way Employees, and who has held that office for two years, and who held the

office of Assistant President for a period of eight or ten years prior to the two years that he has been President. [fol. 111] He qualified as an expert. I was impressed with his honesty, his sincerity and frankness, and he appeared to me as a witness that answered honestly the questions that were put to him by the direct examination as well as the cross examination.

He testified that the reimbursement for the moving in the event that an employee is required to move by virtue of the merger only encompasses the original moving; and, if there is a bumping that involves more than one moving, any subsequent moving would not be paid for by the railroad.

He testified that fringe benefits would become inoperative.

He testified that annuity rights might be jeopardized; that employees of ten years or more seniority would probably not be disturbed in their annuity rights, but anybody with less than ten years of seniority would have his account transferred to Social Security.

He testified it would be impossible, in his opinion—and he was speaking as an expert in my opinion—to place the men back in status quo in the event that they were dislocated by virtue of the merger.

And, I find as a fact that those different items add up to irreparable damage when it is testified by the expert that it would be his conclusion that there would be a great possibility that those rights would be lost forever.

[fol. 112] I am conscious of the fact that this merger is an extensive operation, and I am further in possession of information that the plaintiff or the plaintiffs are desirous of having the merger discontinued only in so far as it affects the dislocation of employees who are named here as employees of the plaintiffs.

So, I don't know whether there is a possibility of working out some sort of a stipulation that would permit this merger to continue and, yet, include the restraint that would protect the status quo until the date of the hearing of the three-judge court.

Is there a possibility of that?

[fol. 112a] / Reporter's Certificate to foregoing transcript
(omitted in printing):

[fol. 113]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 1

STATE OF NEW YORK)

) SS

COUNTY OF BROOME)

LEONARD SERINO being duly sworn, deposes and says:

1—That he is the General Chairman Erie Susquehanna System Federation Brotherhood of Maintenance of Way Employees. His office is in the Professional Building, 117 Hawley Street, Binghamton, New York, and he has held this elective office since October 1952. Prior to his election as General Chairman he was Vice General Chairman for four years and before his election to that office was employed in the Maintenance of Way Department of the Erie Railroad Company from November 1927 to 1958 as a trackman and track foreman.

2—As General Chairman it is his duty to represent employees in the Maintenance of Way Department of the Erie Railroad Company in all matters affecting their wages, working rules and work conditions, and he represents said employees in the presentation of their grievances with the management of the Erie.

3—He is familiar with the complaint filed by the Brotherhood of Maintenance of Way Employees against the United States and the Interstate Commerce Commission in the United States District Court in Detroit, Michigan to restrain the operation of the order entered by the Interstate Commerce Commission approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company until such time as said order

is conditioned in accordance with the requirements of Section 5(2)(f) of the Interstate Commerce Act.

4—That the facts herein stated are based upon personal knowledge of exhibits submitted by the Erie and the Delaware, Lackawanna and Western to the Interstate Commerce Commission in the proceeding designated Finance Docket No. 20707 and the Railroads' testimony offered in support [fol. 114] thereof; conferences with management officials of the Erie and the Delaware, Lackawanna & Western as to their plans for their Maintenance of Way forces after the merger becomes effective; collective bargaining agreements governing the rights of both railroad managements and their employees in the Maintenance of Way Departments; and the existing seniority rosters of employees which evidence each employee's seniority rights in the event of job vacancies due to transfer of work, death, retirement, dismissal or resignation of employees or abolishment of jobs.

5—Upon the effective date of the merger the Erie and the Delaware, Lackawanna and Western will make certain changes in work assignments and work forces and will reconstitute certain seniority districts which will bring into play the seniority rights of the employees in the Maintenance of Way Departments of both railroads.

6—The specific changes to be made and the date of the changes have not been made known by the Erie and the DL & W managements, however, on October 17, 1960, those managements will be authorized to make any changes they deem necessary to effectuate the merger and conferences with those managements indicate that many such changes will take place immediately.

7—Under the provisions of the Interstate Commerce Commission order dated September 13, 1960 and issued on September 15, 1960 the Erie-Lackawanna, as the merged railroads will be known, will be able to abolish any and all jobs they deem necessary to effectuate the merger and the employees who are deprived of employment as a result of such job abolishments will be entitled to certain monetary allowances. Once the jobs are abolished however, and the senior employees exercise their seniority rights to secure

the positions of the employees with seniority rights junior to them with resultant transfers, lay-offs, etc., it will be a [fol. 115] practical impossibility, should the Court sustain the complaint of the Brotherhood of Maintenance of Way Employees to "turn back the clock" and recreate the abolished jobs, move employees whose transfer were caused by those abolishments and thereby so restore the present status quo as to comply with the mandate of Section 5(2)(f). Attempts at such restoration could not be successful and would cause additional expense to the Erie-Lackawanna Management.

8—The result of such a situation would irreparably injure the employees involved because they would be deprived permanently of employment with the Erie-Lackawanna Railroad. Other employees would be transferred and the retransfer of such employees throughout the Erie-Lackawanna system would cause great and irreparable injury to them.

9—The Erie and the Delaware, Lackawanna & Western managements have testified that 600% more jobs will be created by natural attrition and will be abolished because of the merger and therefore no hardship should result to the Erie-Lackawanna as a result of the imposition of the employment protective conditions required by Section 5 (2)(f). For example, the railroad management testified that during the first year following the effective date of the merger 2,507 will be created by attrition while 403 will be abolished.

10—However, if the conditions required by Section 5 (2)(f) are not imposed many employees entitled to be retained in their employment will be forever deprived of that employment.

11—The railroad managements have testified that they intend to effect numerous abandonments of lines of railroad after October 17, 1960 and also shift certain freight traffic from the lines of the DL & W to those of the Erie. The result of any of these abandonments and shifts of traffic will be a lessening of work for Maintenance of Way

[fol. 116] employees, abolishment of many jobs, and the transfer of other jobs. The employees affected will exercise their seniority rights and displace junior employees at other points. These employees in turn will displace employees junior to them and so on until those employees at the bottom of the seniority rosters will be deprived of employment. Such exercise of seniority rights will result in transfers of employees from one point to another and finally in the deprivation of the employment of the youngest employees. Should the Court uphold the complaint of the Brotherhood of Maintenance of Way Employees and enforce the requirements of Section 5(2)(f) the employees who had been deprived of their employment would have to be re-employed, all seniority rights readjusted, employees re-transferred and job abolishments take place through natural attrition.

FURTHER deponent sayeth not.

/s/ LEONARD SERINO

Sworn to before me this
8th day of October, 1960.

/s/ JOHN S. GRANATA

JOHN S. GRANATA

Notary Public, State of New York

Residing in Broome County

Broome County Clerk's No.

My commission expires March 30, 1961

[fol. 116a]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 2

ERIE RAILROAD COMPANY

THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY

REPORT ON
ECONOMICS OF PROPOSED MERGER

WYER, DICK & CO.

UPPER MONTCLAIR, NEW JERSEY

AUGUST 6, 1959

[fol. 117]

PLAINTIFF'S EXHIBIT 2-A

STUDY I

ERIE - LACKAWANNA MERGER STUDY

Common Points

The Erie and Lackawanna in general parallel each other from east to west beginning at Hoboken-Jersey City in the east to Buffalo in the west. At some points they serve the same large terminals, and in other cases their lines cross or meet at smaller outlying stations. With separate operation of the two companies as at present, services are usually performed at these so-called "common points" by two separate operating organizations except, of course, at points where coordination has already been achieved.

The purpose of Study I was to review the operations at all common points, and estimate the potential savings from merger as a result of serving each point with one unified operating organization.

At several locations particularly at Hoboken and Binghamton to Gibson inclusive, certain services are now being performed by unified forces or are contemplated under coordination prior to merger. The Erie and Lackawanna common points from Coopers to Wayland inclusive are included in Study II, Line 5. There remained 13 common points at which merger would result in substantial savings which are summarized for each point in the statement attached as Schedule A, and their location is shown on System Map No. 1.

In order to estimate potential savings from merger the following procedure was used:

Maps were prepared for each common point showing the tracks and important facilities of the roads included in the merger, together with the names and locations of all industries served by private trackage. Statements were also prepared showing the operating data at each point, generally for the year 1956, the latest twelve month period available when the studies were started. These statements covered switching operations, both by yard engines and by road engines doing station switching at the smaller stations. They also covered passenger stations, freight stations, enginehouses, car repair tracks, yard inspection, and miscellaneous operations. A complete statement of forces employed under existing operations, together with their rates of pay, was included. In addition, supplemental information in even greater detail, including time of arrival and departure of trains, cars handled, and cars interchanged, was secured for four of the most important points: Buffalo, Binghamton, Scranton-Avoca, and Hoboken-Jersey City.

Field parties equipped with the data mentioned above were then sent to each common point for the purpose of inspecting the facilities involved, determining which facilities should be retained for use by the consolidated company and which might be retired or released for sale or rental. They also estimated the forces which would be needed for merged operation as compared with the total forces now required for separate operation and developed plans for new yards and facilities where such would be required.

[fol. 118]
STUDY I

In all cases field parties consisted of representatives of Wyer, Dick & Co. and local officers of the railroads serving each point. The most important common points were inspected by the Steering Committee, including Buffalo, Binghamton, Scranton-Avoca area and Hoboken-Jersey City. Recommendations of the field inspection parties, approved or modified by the Steering Committee if the latter did not participate in the inspection, were then incorporated in a so-called "field report" describing the changes. The engineering departments then prepared estimates of the salvage to be recovered from property retired, the estimated cost of new construction and normalized maintenance of facilities to be abandoned or constructed, and the accounting departments calculated the savings in operation and summarized the figures for each common point. It is from these accounting department summaries that the figures shown on Schedule A for each of the 13 common points are drawn.

The total annual savings at the 13 common points, as summarized on Schedule A, prior to the cost of capital required, are estimated at \$5,179,876. The saving, in part, is based upon the estimated abolition of 395 jobs, and it is expected that merger would reduce yard engine operations by 205 shifts per week. A total of 17 yard diesels and six road switchers would be released and savings resulting from release of locomotives are computed in Study VII-L.

Extensive new construction costing \$10,178,643 would be required at Buffalo, Binghamton, Scranton-Avoca, and the New Jersey Terminal area in order to realize the estimated savings from merger. Total cost of new construction for all 13 points is estimated at \$10,215,999, but this is offset somewhat by (1) salvage of \$5,120,494 and (2) non-recurring income tax savings of \$2,151,468 related to property changes, and increased by (3) \$551,793 because of the cost of relocating certain property. The total net cash cost of making the property changes recommended is estimated at \$3,455,830. Interest at 5% per annum on this amount totaling \$172,791 is deducted as an increased expense required in merging the properties, and the total estimated net saving after this deduction is \$5,007,085. To put it another way, the annual operating saving of \$5,179,876 represents a 150% return on the net cost of merging operations at common points.

Buffalo

The principal line of the Lackawanna enters the Buffalo area from the east at East Buffalo and continues to the passenger station at Buffalo. The Lackawanna also has a double track freight line from East Buffalo to Black Rock over which the Pennsylvania and Chesapeake and Ohio Railroads have trackage rights.

The Erie has three lines entering Buffalo. The line from Hornell enters from the east at East Buffalo and this line closely parallels the Lackawanna from Depew to East Buffalo. The line from Jamestown enters from the south over trackage of the Buffalo Creek Railroad, and the Niagara Falls branch from Suspension Bridge and Black Rock enters from the north at East Buffalo. The Chesapeake and Ohio has trackage rights over the latter line between Suspension Bridge and East Buffalo and the Wabash has trackage rights between Black Rock and Smith Street, Buffalo.

The lines described are shown on Map No. 1 included in the map envelope accompanying this report, and a much larger scale map of the Buffalo area is included as No. I-A. The latter shows the principal tracks and facilities of the two roads in color, together with proposed abandonments and new construction.

The principal freight yard of the Lackawanna, comprised of an eastbound yard and a westbound yard separated by the present main lines, is at East Buffalo; and the principal freight yard of the Erie, comprised of six small yards known as Canada, Old BSW, JI, Eastbound Receiving, Eastbound Departure and North Yards, is located immediately west of the Lackawanna freight yard. Both lines have numerous other tracks and small holding yards throughout the Buffalo area required for interchanging cars with other railroads and serving industries.

Through freight trains and all passenger trains will use the Erie line between East Buffalo and Corning. The principal freight yard of the merged company would be located at East Buffalo on the Lackawanna where company owned land is available for expansion and where the least amount of new construction would be required. All freight trains and transfers would originate and terminate in this yard.

The present Lackawanna yard could not handle the combined traffic of the two roads, and it is proposed to build a new modern electronic hump retarder yard at that point. This yard would be located between the present Erie and Lackawanna main lines, and the major portion of the new trackage would be located east of the present Lackawanna eastbound yard. This would permit completion of about 80% of the proposed facility without disturbance of present Lackawanna operations and no disturbance to the present Erie operations.

The proposed classification yard would consist of 44 tracks in four groups of nine tracks and one group of eight tracks with five long tracks of 125 car capacity. Transfers to Black Rock and the various switching areas, interchanges throughout the terminal and all freight trains would leave directly from the classification yard. Buffalo would be reclassified from a regular icing station to an emergency icing station, and the most southerly track in the classification yard would be designated as an icing track. Icing would be performed by mobile truck, and cars of perishable traffic would then be flat switched or re-humped to the proper track.

The westbound receiving yard would be to the east of the classification yard and parallel to the present Lackawanna main tracks and would be so located to permit hump engines to push directly from the receiving yard over the hump. The westbound receiving yard would have seven tracks, the longest being of 160 car capacity.

Twenty-five tracks of the present Lackawanna westbound yard directly to the north of the proposed hump classification yard would be used as a receiving yard for freight trains from Jamestown and Suspension Bridge and for all transfers and industrial engines. The coal yard consisting of thirteen short tracks directly to the north of the westbound yard would be used for cleaning and storage of cars.

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That portion of the Erie principal yard known as Canada Yard would be used as a base yard for industry cars for the Erie Ferry Street, Babcock Street, Hamburg Street, Louisiana Street and Niagara Frontier Food Terminal industrial districts and for storage of hold grain. The Lackawanna Abbott Road yard would remain unchanged and serve the adjacent industrial area.

Transfers would be operated between East Buffalo and Black Rock and because of the location of the proposed main yard of the merged company it is proposed to use the Lackawanna line from East Buffalo to Delavan Avenue as indicated in Study #11, Line No. 6. This will also greatly relieve the congestion in the heavy industrial district between William Street and Delavan Avenue on the Erie Niagara Falls branch.

Passenger trains would be rerouted from the Erie line to the Lackawanna line at William Street, East Buffalo, and through freight trains would be rerouted from the Erie line to the Lackawanna line at Depew. New remote controlled connections would be provided at both locations. This provides for the operation of passenger trains along the southerly edge of the proposed yard instead of through the middle of the Lackawanna yard as at present.

All road engines, and switch engines working in the area, would be serviced at the Erie enginehouse at East Buffalo and additional diesel fuel storage would be provided by relocating the Lackawanna 400,000 gallon diesel fuel tank. Switch engines at Black Rock would be serviced from existing facilities or by truck and would return to East Buffalo for emergency repairs and monthly inspections.

The only freight car repair track in the Buffalo area would be at the present Lackawanna shop at East Buffalo. Only running repairs would be made at this location, and the present Lackawanna repair building and trackage would be modified to provide for progressive repairs.

Two piggyback loading and unloading tracks would be located adjacent and parallel to the leads at the west end of the present Lackawanna westbound yard.

The Lackawanna freighthouse would be used for all LCL freight and the Erie office building would be used for the station agency and clerical force.

With the concentration of freight yard operations and facilities described above, the following major abandonments become possible:

[fol. 121]

STUDY I

Erie

- East Buffalo - JX Yard: entire yard and buildings
- Old BSW Yard: entire yard and buildings
- Eastbound Departure Yard: entire yard and buildings
- Eastbound Receiving Yard: entire yard and buildings
- North Yard: entire yard
- Repair Yard: entire yard and buildings
- IQ Tower: building and interlocking plant

Buffalo - Louisiana Street: freight house, nine tracks, gantry crane and truck scale.

Lackawanna

East Buffalo - Eastbound Yard: entire yard, interlocking plant, interchange tracks, eastbound car repair tracks, icing facility, covered stock pens and other related buildings.

Enginehouse: all tracks except two, enginehouse office building, portion of enginehouse, turntable, sanding and fueling facilities, small fuel storage tanks.

Repair Yard: track scale

After the proposed plan of operation for the entire terminal and facilities required had been developed, the effect of these facilities on existing operations was analyzed.

Many examples of duplication and wasted effort as a result of separate operation were observed by the Committee during its inspection of the terminal, but one may be cited here. Both lines operate transfers to the same interchange points with other railroads and between East Buffalo and Black Rock. Except on weekends, the Lackawanna operates eighteen and the Erie operates twelve transfer assignments per day. It is estimated that the merged company would operate twenty-two assignments or a saving of eight assignments per day.

The final step in the analysis was to set up the proposed switch engine and transfer tracks, supervisory forces, and employees which it is estimated would be required to operate the merged terminal, compare them with existing forces and estimate the savings.

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The estimated savings in switch engine and transfer shifts may be summarized as follows:

Switch Engine Shifts	No. of Shifts Worked Classified According to Days Worked Per Week											
	Erie			DL&W			Total			Merged Company		
	7	6	5	7	6	5	7	6	5	7	6	5
East Buffalo	11	-	1	13	-	2	24	-	3	14	1	-
NFFT	2	1	-	-	-	-	2	1	-	2	1	-
Hamburg Street	-	1	-	-	-	-	-	1	-	-	1	-
Louisiana Street	1	1	-	-	-	-	1	1	-	1	1	-
Babcock Street	3	-	-	-	-	-	3	-	-	3	-	-
Coal Yard	-	-	-	3	-	-	3	-	-	-	-	1
Shop Yard	-	-	-	1	-	-	1	-	1	-	-	2
Abbott Road	-	-	-	3	-	-	3	-	-	3	-	-
City	-	-	-	1	2	-	1	2	-	1	2	-
Columbia Street	-	-	-	1	2	-	2	-	-	1	2	-
<u>Transfers</u>	<u>9 - 3</u>			<u>11 7 -</u>			<u>20 7 3</u>			<u>15 6 1</u>		
Totals	26	3	4	33	11	3	59	14	7	40	14	4

Estimated Decrease in Switch Engine and Transfer Shifts

7-day shifts
5-day shifts

19

3

The Erie yard has three antiquated rider humps and of the twenty-four, seven-day assignments eliminated, one operates with a twelve-man ground crew in addition to the engine crew, one with an eleven-man crew, one with a ten-man crew, one with an eight-man crew, one with a seven-man crew, one with a six-man crew and one with a five-man crew. One of the five-day assignments operates with a four-man crew.

The above reduction in switch engine shifts and transfers represents the elimination of about 136 jobs daily. The aggregate saving is \$1,803,556 per year and the release of ten diesel yard locomotives for other service would result.

As to forces employed in yard offices, freight stations, etc., the statement below summarizes estimated net reductions or additions in jobs which would result from merger.

The net changes in jobs are shown, regardless of whether they are assigned to work five, six or seven days per week. The number of employees involved would be slightly greater because of the relief men required to handle the 6th and 7th day assignments.

[fol. 123]

	Net Number of Jobs Abolished
Yard Forces	27
Freight Stations	10
Enginehouses	22
Car Inspectors	46
Freight Car Repair Tracks	20
Miscellaneous	4 (Added)
Total	121

Total estimated savings in non-operating labor in the Buffalo study are \$736,642, which is included in the total savings from all sources of \$2,007,340 per year. Total net cash required, mostly for construction of the new hump yard, is estimated at \$4,075,681, and after interest on this amount at 5% is deducted, net savings are shown as \$1,803,556.

In a sense, the proposal to spend over \$4,000,000 for a yard at Buffalo may not seem consistent with Studies V and XIII where it is estimated the merged company would experience a total of about \$12,000,000 of revenue lost or diverted from the Buffalo Gateway.

It is suggested that in the event of merger the order of procedure would be to concentrate on Hornell and when changes have been completed there, it would then be possible to gauge more accurately the movement of traffic through Buffalo. It may well be that announcement of plans to provide a modern yard at Buffalo as early as possible after merger will be a powerful deterrent to diversion of traffic through solicitation by the western connections.

If business is diverted as anticipated, the expenditure at Buffalo may not be necessary in large part, but on the other hand if spent it may prevent a substantial loss of traffic to other lines.

In any event, the form in which these studies are presented represents, in our opinion, the maximum potential loss and greatest foreseeable expenditure at Buffalo. Final results may show some modification of one or both.

Binghamton

The Erie and Lackawanna main lines from Hoboken-Jersey City converge at Great Bend and Hallstead about fourteen miles east of Binghamton and parallel each other on opposite banks of the Susquehanna River to a point about two miles east of Binghamton where the two rights of way adjoin each other and remain parallel westward through the city. The Lackawanna also has a branch line northward from Binghamton to Chenango Forks from which point separate lines run to Syracuse and Utica.

STUDY I [fol. 124]

The Lackawanna East Binghamton yard would be the main yard for the merged company in the Binghamton area. This yard would combine traffic to and from the east and to and from Scranton with D&H interchange traffic and would also serve as a distribution point for empty equipment for the territory.

The three present receiving and departure tracks would be lengthened to a capacity of about 150 cars which in turn would require other minor track revisions. A new freight car cleaning track would be provided and the switching lead at the east end of the yard would be lengthened.

West of Binghamton the Erie and Lackawanna will be coordinated prior to merger and the freight stations are now coordinated. The merged company would use the same freight and passenger station as under coordination.

The present Lackawanna enginehouse and car department facilities at East Binghamton would be used.

Under the plan of operation described above the following major abandonments become possible: all except six tracks in the Erie Binghamton yard, Erie mechanical facilities, four tracks in the DL&W "YO" yard and the Erie line between Binghamton and Great Bend as proposed in Study II, Line No. 4.

As a result of the above changes, 18 switch engine tricks per week, four yard force positions, four enginehouse positions, and two car inspectors would be eliminated and one yard diesel locomotive would be released. Four positions would be added for car cleaning. The net cash cost is estimated at \$15,403 and the estimated net annual saving from all sources is \$190,533 including 5% interest on the net cash cost.

Scranton-Avooca

The Lackawanna main line is an east-west line passing through the area at Scranton at which point major yards and system heavy repair facilities for locomotives and cars are located. The Lackawanna also has a north-south branch line from Scranton to Northumberland known as the "Bloomsburg Branch" which serves the territory on the west side of the Lackawanna and Susquehanna Rivers including Taylor, Kingston and Plymouth.

The Erie branch line from Lackawanna enters the territory at Rock Jct. and terminates at Plains Jct., serving the area east of the Lackawanna and Susquehanna Rivers including Dunmore, Scranton, Avooca and Pittston. Secondary branch lines serve the territory from Rock Jct. to Jessup and from Hillside Jct. to Plains.

Main freight yards are at Avooca on the Erie and Taylor and Scranton on the Lackawanna. The Lackawanna also has a large retarder yard on the Keyser Valley Branch known as Hampton Yard which is not in use except for storage of cars.

[fol. 125]

In addition to the above, both lines have numerous mine spurs, industry tracks, and small yards throughout the entire area. The lines described above are shown on Map No. I-B and this map also indicates trackage rights for all lines in this territory.

The plan of operation for this area was based upon abandonment of the Erie line between Hillside Jct. and Hawley as proposed in Study II, and use of the Erie line as the main freight route between Hoboken-Jersey City and Great Bend as proposed in Study IV.

The Lackawanna Taylor yard would be the main freight yard for the entire area and Scranton yard would be used mainly as an industrial supporting yard. A segment of the Erie Old Forge Branch would be restored connecting with the Lackawanna Bloomsburg Branch at Old Forge to provide access to the Erie Avoca, Pittston, Plains and Plains Jct. areas. Access to Erie mines and industries north of Pikeson City would be via the present Lackawanna route.

Interchange with the CNJ would be at Taylor, with the Lehigh Valley at Pittston Jct. and with the D&H at Scranton.

The Lackawanna diesel shop and freight house at Scranton would be used and the Lackawanna freight repair track would be moved to Taylor yard.

With the concentration of freight operations in the manner described, the following major abandonments shown on Map I-B become possible:

Erie

Scranton: two freight house tracks and freight house.

Dunmore: four yard tracks, one freight house track, freight house, engine house and related trackage, and track scale.

Avoca: bulk of yard, enginehouse and related trackage, car repair facility and track scale.

D&H

Scranton: car repair facility and trackage.

In addition, the following lines in this territory which are also shown on Map No. I-B would be abandoned and are included in Study II:

Line No. 1: Erie line Hillside Jct. to Hawley

Line No. 2: Erie line Rock Jct. to Gypsy Grove

Line No. 3: Erie line Dunmore to East Jct.

STUDY I [fol. 126]

In addition to switch engine savings resulting from consolidation of operations this area would realize savings due to rerouting of through traffic over the Erie line east of Hallstead and it is estimated that 60 switch engine shifts per week would be eliminated which may be summarized as follows:

Location	Switch Engine Shifts Per Week			
	Erie	DL&W	Merged Company	Net Decrease
Scranton-Taylor	-	205	163	42
Avoca	18	-	5	13
Dunsmore	10	-	5	5
Total	28	205	173	60

Rearrangement of mine runs would result in estimated annual savings of \$33,845. The reduction in yard and road service would also release two diesel yard and six road switcher locomotives for other service, which includes three Erie road units now operating on the Avoca-Ashley turn and two Lackawanna helper units.

The statement below summarizes estimated net reduction in non-operating jobs which would result from merger.

	Net Number of Jobs Abolished
Freight Station	3
Yard Forces	12
Enginshouses	22
Freight Car Repair and Inspection	31
Miscellaneous	2
	70

Total estimated savings in non-operating labor are \$375,651, which are included in total savings from all sources of \$905,401 per year. Total net cash required is estimated at \$63,482 and after interest on this amount at 5% is deducted, net savings are shown as \$902,227.

Of the \$507,611 required for new construction, approximately \$263,000 represents the cost of restoring a portion of the Erie Old Forge Branch. Due to mine flood damage in the Pittston area, it may be that the level of business on the Erie lines south of Avoca would not warrant the new construction. The Avoca area could be reached via Pittston Jct. and the Lehigh Valley over which the Erie now has trackage rights and it is recommended that this alternative be investigated prior to construction of the proposed extension.

Hoboken-Jersey City

The Erie main line reaches Jersey City via Ridgewood, Rutherford and Croxton. At Croxton the line divides into a single track tunnel line used for freight only and a single track archway line used for both freight and passenger, which lines again converge at Jersey City. A branch line extends from the east end of the tunnel to Weehawken. The Erie Northern and Greenwood Lake Branches enter the main line in the vicinity of Croxton. The Newark Branch enters the Greenwood Lake Branch about one mile west of Croxton.

The Lackawanna Boonton Branch enters Hoboken via Clifton, Passaic, Kingsland, and Secaucus, and this line is joined by the Morris and Essex Branch from Summit at Bergen Jct. The Lackawanna also has a branch line used for freight only from Kingsland on the Boonton Branch to Harrison on the Morris and Essex Branch.

The main freight yard of the Erie is at Croxton with principal supporting yards at Jersey City and Weehawken. At present all through freight trains originate and terminate at Croxton and transfers handle all traffic between this point and the supporting yards. All Erie lighterage is handled at Weehawken except for a small portion of covered lighterage which is handled at Jersey City Pier 8. All car float traffic is handled at Jersey City.

The Lackawanna main yard is at Hoboken and principal supporting yards are at Secaucus and Harrison. Through freight trains originate and terminate at Hoboken and pick ups or set outs are made at Secaucus. All Lackawanna lighterage operations are concentrated at Hoboken.

The lines and facilities described above comprise the New Jersey Terminal Area and are shown in detail on Map No. I-C included in the envelope.

Passenger operations are for the most part already coordinated in the Lackawanna station at Hoboken, and for the purpose of this study it was assumed all passenger service would be coordinated and the Erie passenger facilities at Jersey City would be abandoned prior to merger.

In order to settle on a terminal plan for this area it was first necessary to determine the main line which would be used for handling through freight to and from Binghamton and the west. This question was analyzed in Study IV where it was determined the Erie line would be used.

It was also necessary to determine the water front railhead facilities which would be used. A special day by day car and tonnage study was made for December, 1956, which was the heaviest month on both lines during the year, and based thereon we believe the Lackawanna facilities would be used for all open lighterage, with the area now occupied by the Lackawanna float bridges converted to facilities for storage and handling of open lighterage.

STUDY I [fol. 128]

Erie Pier 8 would be used for all westbound and certain selected eastbound covered lighterage. Lackawanna Piers 3, 4, 7 and 9 would be used for the balance of eastbound covered lighterage. Lackawanna Piers 5 and 6 would be used for all coal, grain and cement.

All car float traffic would be handled at the Erie facility. Two modern electric float bridges would be added just south of the present bridges, and a supporting yard for the additional float bridges would be constructed on the site of the present passenger station trackage and passenger car yard at Jersey City. The Erie truck-in-lieu of lighterage facility at Jersey City would be used and would be expanded.

This plan not only concentrates all marine freight operations at one central location allowing for greater efficiency in tug operations, but also eliminates towing to and from Weehawken resulting in substantial savings included in Study VII-M. Additional advantages are as follows:

Based on the above, Erie Croxton Yard would be the main outer yard for the merged company and most of the crews in through freight, local freight, transfer and yard service would originate and terminate at that point. Two new connections are proposed at the intersection of the Erie Greenwood Lake Branch and the Lackawanna Harrison-Kingsland Branch to facilitate movements between Croxton Yard and Harrison and between Croxton Yard and the Lackawanna Boonton Branch. One train per day handling car float and industrial traffic for Jersey City from the west would be classified west of Croxton and would operate direct to Jersey City without break up at Croxton and one westbound forwarder train would also be made up and depart from Jersey City. Two tracks would be replaced on the Erie archway line east of Palisade Avenue and connect with present yard tracks at Jersey City to serve as long receiving and departure tracks.

Coal trains from Scranton would operate direct to Hoboken, and empty hopper trains would operate out of Hoboken.

Harrison Yard would remain unchanged and would serve as a base yard for industries in that territory and for local way freight crews. Monmouth Street Yard would also remain unchanged and would continue to be used for storage of commuter passenger equipment during daytime layover.

The Erie piggyback facility at Croxton would be used and the Lackawanna facility would be converted to much needed team track area.

Weehawken yard would be reduced to a yard handling interchange and local industrial business. Pier H would be retained for handling iron ore from boat to car. A shell-type building would be constructed on the present site of the Bowery Yard for the handling of set-up automobiles for export now handled at Erie Pier D.

The Lackawanna float bridge at 11th Street, Hoboken, would be retained for handling General Foods business.

The Lackawanna freight house at Hoboken would be used and the Erie freight house at Jersey City would be leased.

[fol. 129]

• STUDY I •

The Erie enginehouse facilities at Jersey City and Croxton and the Lackawanna enginehouse at Hoboken would be retained.

The Erie car repair track at Croxton would be expanded and would serve the entire terminal.

All perishable protective service would be handled at Croxton and Jersey City.

As a result of the above changes in the manner described, the following major abandonments become possible:

Erie

Weehawken: all of present Bowery Yard, storehouse and crane shop. Annex "A", Piers A, B, C, D and F and all adjacent land and related trackage outlined in yellow shown on the insert of Map No. I-C would be available for sale or lease.

Jersey City: all passenger station and passenger yard trackage and facilities which will not be retired under coordination but which would be necessary to accomplish the proposed track changes for the supporting yard for the new car float bridges. Grove Street interlocking would be retired, but the tower and remote control interlocker would be retained.

DL&W

Hoboken: all float bridges, portion of float yard trackage, east end of four yard tracks, car repair track and facilities, Henderson Street enginehouse tracks and turntable, west end of freight house tracks, icing facility, float yard track scale, and piggyback facility.

Secaucus: bulk of yard, track scale, all repair tracks and facilities, runaround track, running track from Secaucus to Erie Greenwood Lake connection, portion of DL&W-PRR interchange track at West End, yard office and portion of interlockings at West End Tower and Hackensack River Bridge.

The net change in switch engine shifts and transfers may be summarized as follows:

STUDY [Eq. 130]

No. of Shifts Worked (Classified According
to Days Worked Per Week)

	Erie			DL&W			Total			Merged Company		
	7	6	5	7	6	5	7	6	5	7	6	5
Weehawken	1	2	2	-	-	-	1	2	2	-	2	1
Jersey City	4	4	7	-	-	-	4	4	7	6	7	8
Hoboken	-	-	-	8	6	9	8	6	9	1	8	3
Croton	7	6	5	-	-	-	7	6	5	13	9	3
Secaucus	-	-	-	2	-	1	2	-	1	-	-	-
Transfers	6	-	-	3	-	1	9	-	1	3	6	-
Totals	18	12	14	13	6	11	31	18	25	23	32	15

Estimated Increase/Decrease

7-day shifts - D

6-day shifts - I

5-day shifts - D

8

14

10

The above summary represents the elimination of 22 switch engine shifts per week. However, 14 car rider positions would be added at Croton. Two yard diesel locomotives would be released.

The statement below summarizes estimated net reductions in non-operating jobs which would result from merger:

Net Number of Jobs
Abolished

Yard Forces	14
Pier and Lighterage	48
Freight Station	30
Station Bureau	10
Enginehouse	6
Car Inspectors	21
Car Repair Track	18
Miscellaneous	13

Total 160

Total estimated savings in non-operating labor are \$965,425, which is included in the saving from all sources of \$1,578,403. Total net cash realized is estimated at \$123,551, and after interest on this amount at 5% is added, net savings are shown as \$1,584,581.

The total estimated cost of new construction is \$3,273,276 most of which represents new construction at Jersey City, Hoboken and Weehawken but this amount is more than offset by (1) salvage from property retired, (2) non-recurring income tax saving and (3) extraordinary expense which would be eliminated as a result of merger detailed in Column 12 of Schedule A.

[fol. 131]

STUDY I

Other Common Points

The same procedure was used to determine necessary changes and estimate the net savings of the other nine Common Points shown on Schedule A.

ERIE - LACKAWANNA MERGER STUDY
Common Points
Summary of Net Cash Required and Estimated Savings

STUDY 1
Schedule A

	1	2	3	4	5	6	7	8	9	10	11	12	13	
	Black Rock	Buffalo	Lancaster and Dewey	Corning	Elmhurst	Scranton- Avoca	Mountain View	Little Falls	Peterson	Pascale	Newark- Harrison- Kearny	Woboken- Jersey City	N. Y. City Frt. Stations	Total - All Points
A. Net Cash Required For or Realized From Merger														
1. Salvage from Property Retired	\$ 49,530	\$1,448,960	\$42,856	\$221,981	\$124,393	\$225,410	\$1,400 L	\$ 25	\$24,911 G	\$ ---	\$ 58 G	\$1,984,710 G	\$ ---	\$ 5,120,494 G
2. Extraordinary Expenditures Next Four Years	---	---	---	---	---	---	---	---	---	---	---	---	---	---
3. Property Acquired	9,994 L	6,308,823 L	2,119 L	9,648 L	188,933 L	507,811 L	800 L	---	---	---	---	40,000 G	---	40,000 G
4. Cost of Relocating Property	10,872 L	65,948 L	7,404 L	2,420 L	20,743 L	7,504 L	---	---	13,945 L	---	850 L	3,272,276 L	---	10,215,999 L
5. Non-Recurring Income Tax Saving	45,072	755,310	45,625	195,174	69,380	226,223	---	---	4,378 L	---	100 L	425,526 L	---	551,793 L
6. Total Net Cash Required For or Realized from Merger	\$73,736	\$4,075,681 L	\$82,958	\$398,087	\$15,403 L	\$63,482 L	\$ 443 L	\$1,826 G	\$18,280 G	---	\$ 741 G	\$ 123,551 G	---	\$ 3,455,830 L
B. Revenues														
1. Freight Service	---	---	---	---	---	---	---	---	---	---	---	---	---	---
2. Miscellaneous	---	17,048 L	---	---	8,490 L	651 L	---	---	1,000	---	3,250	1,301 L	---	1,301 L
3. Total Revenues	---	\$17,048 L	---	---	\$8,490 L	\$ 651 L	---	---	\$ 1,000	---	\$3,250	\$3,179	\$3,350	\$ 15,410 L
C. Expenses														
Maintenance of Way and Structures														
1. Normalized Maintenance	\$10,719	\$12,337	\$17,107	\$55,277	\$28,581	\$28,470	\$ 259	\$ 414	\$ 3,651	---	\$ 513	\$286,731	---	\$ 444,059
2. Depreciation	1,223	23,789 L	3,504	13,716	8,436	16,156	556	514	1,252	---	527	268,093	---	290,218
3. Total Maintenance of Way and Structures	\$11,942	\$11,452 L	\$20,611	\$68,993	\$37,017	\$44,626	\$ 815	\$ 928	\$ 4,903	---	\$1,070	\$554,824	---	\$ 734,277
Station Expenses														
4. Combination	---	---	\$5,671	---	---	---	---	---	---	---	---	---	---	---
5. Freight	---	56,075	---	4,462	---	16,312	\$4,570	\$4,750	10,927	\$15,828	12,670	461,143	114,301	14,991
6. Passenger	---	---	---	8,792	---	---	---	---	---	---	---	---	---	8,792
7. Total Station Expenses	---	\$56,075	\$5,671	\$13,254	---	\$16,312	\$4,570	\$4,750	\$10,927	\$15,828	\$12,670	\$461,143	\$114,301	\$ 715,501
Other Operating Expenses														
8. Yard Switching	\$116,568	\$1,098,711	---	\$ 14,589 L	\$105,214	\$347,945	---	---	---	---	---	\$ 32,710	---	\$ 1,686,559
9. Train Switching	---	---	13,735	---	---	33,945	---	---	---	---	---	---	---	48,612
10. Yard Transportation Forces	27,511	186,572	---	---	23,362	68,730	---	---	1,032	---	---	---	---	376,085
11. Enginehouses	---	170,760	---	---	21,347	125,564	---	---	---	---	12,967 L	82,777	---	544,142
12. Car Repair and Inspection Forces	14,067	336,732	---	---	6,154	150,687	---	---	---	---	---	25,522	---	693,428
13. Miscellaneous	---	41,922 L	---	---	15,059 L	15,603	---	---	---	---	---	184,188	---	32,555
14. Total Other Expenses	\$158,146	\$1,750,402	\$13,735	\$ 14,589 L	\$143,018	\$743,274	---	---	\$1,032	---	\$12,967 L	\$1,399,230	---	\$ 3,181,581
15. Total Expenses Saved	\$170,066	\$1,795,025	\$40,017	\$ 67,658	\$180,036	\$804,212	\$5,385	\$5,678	\$16,862	\$15,828	\$ 373	\$1,415,197	\$114,301	\$ 4,631,159
D. Railway Tax Accruals														
1. Payroll Taxes	\$ 20,027	\$ 229,365	\$ 3,884	\$ 5,622	\$ 19,758	\$101,840	\$ 704	\$ 762	\$2,130	\$ 2,599	\$ 122 L	\$ 180,027	\$ 17,633	\$ 584,127
Total Savings, Revenues and Expenses	\$190,115	\$2,007,340	\$43,901	\$ 73,280	\$191,503	\$905,401	\$6,089	\$6,440	\$19,992	\$18,427	\$ 4,001	\$1,578,403	\$135,184	\$ 5,179,870
Interest at 5% on Net Cash Required For or Realized From Merger	\$ 3,687	\$ 203,784 L	\$ 4,148	\$ 19,904	\$ 770 L	\$ 3,174 L	\$ 22 L	\$ 91	\$ 914	---	\$ 37	\$ 6,178	---	\$ 172,791 L
Total Estimated Net Savings From Merger	\$193,802	\$1,803,556	\$48,049	\$ 93,184	\$190,533	\$902,227	\$6,067	\$6,531	\$20,906	\$18,427	\$ 4,038	\$1,584,581	\$135,184	\$ 5,007,085
Net Number of Positions Abolished	8	121	1	2	6	70	1	1	2	3	---	160	20	395
Switch Engine Tricks Eliminated - Per Week	13	97	---	5 L	18	60	---	---	---	---	---	---	---	205
Diesel Locomotives Released														
1. Yard	1	10	1	---	1	2	---	---	---	---	---	---	---	17
2. Road	---	---	---	---	---	---	---	---	---	---	---	---	---	6

No. symbol - Gain
L - Loss
I - Increase

PLAINTIFF'S EXHIBIT 2-B

STUDY II

ERIE - LACKAWANNA MERGER STUDY

Duplicate Lines

In a few localities the lines of the companies are parallel or close together. In other instances while the lines are not parallel, they serve the same points.

The purpose of Study II was to examine all these instances to determine whether any lines could be abandoned and still maintain good service to all important shipping and receiving points without loss in revenue or increase in expense. Attached Schedule A summarizes the instances where it is felt the merged company would be able to make such abandonments and shows the estimated salvage value, the cost of new construction necessary in connection with such abandonments, the non-recurring income tax savings which would result, the savings in operating expenses, the estimated improvement in net income which would result, the estimated number of diesel locomotive units which would be released, and other related information.

It will be noted that the miles of road which could be abandoned are estimated at 96.3. The salvage is estimated at \$1,542,450, the cost of new construction is estimated at \$2,056,162, and non-recurring income tax savings are estimated at \$1,299,607. The abandonments would thus increase net cash by \$723,391 and, at the same time, would effect an annual increase in net income before income taxes of \$662,083.

The longest single line included in the study is the Erie line from Hillside Junction to Hawley, a distance of 41.1 miles. This line is used primarily for through service between the Wyoming Valley and north-eastern New Jersey points which under merger would be maintained via the DL&W's present line, and no loss of revenue is anticipated from this abandonment.

The Erie line from Cornring to Wayland, a distance of 36 miles, parallels the Lackawanna main line. With the exception of small segments to protect industries and interchange, this line would be retired with estimated annual savings of over \$200,000. New connections with the Lackawanna would permit way freight and switching service to be performed by the merged company with only minor loss of freight revenue.

In addition to the savings shown, switching, transfer and mine run service savings made as a result of retiring duplicate lines numbers 2, 3 and 6 were included in Study I.

ERIE - LACKAWANNA MERGER STUDY

STUDY II
Schedule A

Duplicate Lines
Summary of Net Cash Realized and Estimated Savings

	1 Erie Hillside Jct.- Hawley	2 Erie Rock Jct.- Grove Grove	3 Erie Dunmore- East Jct.	4 Erie Binghamton- Great Bend	5 Erie Wayland- Corning	6 DL&W E. Buffalo- Black Rock	Total
A. <u>Miles of Road Abandoned</u>	41.1	1.7	2.2	11.6	36.0	3.7	96.3
B. <u>Net Cash Realized From Merger</u>							
1. Salvage From Property Retired	\$ 628,120 G	\$52,496 G	\$25,644 G	\$ 410,980 G	\$284,129 G	\$141,081 G	\$1,542,450 G
2. Extraordinary Expenditures Next Four Years	---	---	---	---	---	---	---
3. Cost of Property Acquired	---	---	40,815 L	1,542,413 L	146,060 L	328,880 L	2,058,168 L
4. Cost of Relocating Property	---	---	---	9,270 L	7,630 L	43,598 L	60,498 L
5. Non-Recurring Income Tax Saving	620,778 G	44,109 G	39,197 G	173,279 G	288,376 G	133,878 G	1,299,607 G
6. Total Net Cash Realized	\$1,248,898 G	\$96,605 G	\$24,016 G	\$967,424 L	\$418,815 G	\$97,519 L	\$723,591 G
C. <u>Estimated Net Savings</u>							
<u>Revenue Lost</u>							
1. Freight Service	---	---	---	---	\$ 487 L	\$ ---	\$ 487 L
2. Passenger Service	---	---	---	---	---	---	---
3. Miscellaneous	---	---	---	---	---	---	---
4. Total Revenue Lost	---	---	---	---	\$ 487 L	---	\$ 487 L
D. <u>Expenses Saved</u>							
<u>M&S</u>							
1. Cost of Normalized Maintenance	\$116,520	\$10,195	\$5,465	\$97,290	\$90,454	\$28,702	\$338,626
2. Depreciation	28,367	3,584	2,472	8,684 L	23,635	4,851	54,225
3. Total Maintenance of Way and Structures	\$144,887	\$13,779	\$7,937	\$88,608	\$104,089	\$33,553	\$392,851
<u>Station Expenses</u>							
4. Combination	\$ ---	---	---	\$ 4,808	\$ ---	---	\$ 4,808
5. Freight	9,423	---	---	---	26,904	---	36,327
6. Total Station Expenses	\$ 9,423	---	---	\$ 4,808	\$ 26,904	---	\$ 41,135
<u>Other Operating Expenses</u>							
7. Freight Train Service	\$ 94,335	\$ ---	---	---	\$ 39,605	---	\$133,940
8. Passenger Train Service	---	---	---	---	---	---	---
9. Yard Transportation Forces	---	8,578	---	---	---	---	8,578
10. Joint Facility - Expenses	---	---	---	---	---	---	---
11. Total Other Expenses	\$ 94,335	\$ 8,578	---	---	\$ 39,605	---	\$142,518
12. Total Expenses Saved	\$248,645 G	\$22,357 G	\$7,937 G	\$95,414 G	\$170,598 G	\$33,553 G	\$576,504 G
E. <u>Railway Tax Accruals</u>							
1. Payroll Tax	\$ 20,421 G	\$ 2,351 G	\$ 505 G	\$ 9,727 G	\$ 14,689 G	\$ 2,203 G	\$ 49,896 G
F. <u>Total</u>	\$269,066 G	\$24,708 G	\$6,442 G	\$103,141 G	\$184,800 G	\$35,756 G	\$625,915 G
G. <u>Interest at 5% on Net Cash Realized From Merger</u>	62,445 G	4,830 G	1,201 G	48,371 L	20,941 G	4,876 L	361,170 G
H. <u>Total Net Savings</u>	\$331,511 G	\$29,538 G	\$9,643 G	\$54,770 G	\$205,741 G	\$30,880 G	\$662,083 G
I. <u>Road Diesel Locomotive Units Released</u>	1				1		2

G - Gain
L - Loss

PLAINTIFFS' EXHIBIT 2-C

STUDY XVI

ERIE - LACKAWANNA MERGER STUDY

Labor ContractsA. Payments under the Washington Agreement or Interstate Commerce Act to employees deprived of employment or otherwise adversely affected by consolidation.

The effect of coordination or consolidation of railroad operations upon personnel has long been a subject of negotiation between management and labor organizations, and the question became particularly acute in the early 1930's when the depression was forcing such actions in order to effect necessary savings. A general agreement as to treatment of employees thus deprived of employment or otherwise adversely affected was reached in May, 1936, in Washington, D. C., between the labor organizations and the carriers, which has to a large extent set the pattern since that date and which has become known as the "Washington Agreement".

The question was further considered at length in connection with revisions of the Interstate Commerce Act in 1940 and Section 5 (2) which permits consolidation of carriers subject to approval of the Interstate Commerce Commission, also provides that the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. Certain allowances to affected employees were specified in the Act and these differ from the provisions of the Washington Agreement. Under some conditions the Interstate Commerce Act is more favorable to affected employees than the Washington Agreement, but under other conditions the Washington Agreement is more favorable.

The Commission applied the terms of the Interstate Commerce Act in its order dated May 17, 1944 in Oklahoma Ry. Co. Trustees Abandonment, 257 ICC 177, and for some years assumed that the allowance under the Interstate Commerce Act should be taken as the maximum allowance permissible. This position was assailed by the labor organizations and following the decision of the Supreme Court of the United States in Railway Labor Executives' Association v. the United States, 339 U.S. 142 dated March 27, 1950, it has been accepted that the Interstate Commerce Act represents minimum rather than maximum protection and that agreements between employers and employees can provide for greater protection.

In one of the most important recent cases, that of the consolidation of the Louisville and Nashville and the Nashville, Chattanooga and St. Louis, F.D. No. 18845, decided March 1, 1957, the Commission proposed conditions giving the protection afforded by the Washington Agreement, reduced as to dismissed employees to the extent that they receive compensation in any other employment or under employment insurance laws, with minimum protection being that afforded by the so-called "Oklahoma conditions" based on the Interstate Commerce Act.

STUDY XVI
[Vol. 136]

In the present instance, the merger of the two companies under study would result not only in reductions in working forces, but also in dislocations and rearrangements affecting many of the remaining employees, and the first purpose of Study XVI was to estimate the payments that would be required by the Interstate Commerce Commission for the protection of employees deprived of employment or otherwise adversely affected by the merger.

The Washington Agreement provides for four types of payments to employees affected by consolidation which are summarized in the following paragraphs:

(a) "Displacement Allowance" (Section 6) -

Employees who, while not losing their jobs, are placed in a worse position with regard to compensation and rules governing working conditions at any time during a period not exceeding five years from the effective date of a consolidation, are entitled to receive a "displacement allowance". This allowance is a monthly payment equal to the difference between the average monthly compensation for the year preceding displacement and the compensation received after displacement.

(b) "Coordination (Consolidation) Allowance" (Section 7) -

Any employee who within three years from the effective date of the consolidation, is deprived of employment as a result of consolidation or coordination, shall for certain specified periods receive a monthly allowance equal to 60% of his average monthly compensation for the year preceding his release, except that a lump sum payment is made for employees with less than one year's service. The allowances are made in accordance with the table below:

[fol. 137]

Length of Service of EmployeeLump Sum Payment

Less than one year Equivalent to 60 days pay

Payments equal to 60% of
average monthly compensation for period of -

One year and less than two years	6 months
Two years and less than three years	12 months
Three years and less than five years	18 months
Five years and less than ten years	36 months
Ten years and less than fifteen years	48 months
Fifteen years and over	60 months

This allowance shall be reduced to the extent of an employee's earnings in other railroad employment.

- (c) "Separation Allowance" (Section 9) - Any employee eligible to receive a "coordination (consolidation) allowance" may, in lieu thereof, take a lump sum payment called a "separation allowance" as set forth below:

Separation Allowance

Less than one year	5 days pay for each month worked.
One year and less than two years	3 months pay.
Two years and less than three years	6 months pay.
Three years and less than five years	9 months pay.
Five years and over	12 months pay.

- (d) "Moving Allowance" (Sections 10 and 11) - The agreement also provides that any employee who accepts a change in the location of his employment as a result of consolidation shall be reimbursed for his moving and traveling expenses, and for loss of wages not to exceed two days, provided the expenses are incurred within three years of the date of the consolidation (Section 10). It further provides that employees who move shall also be reimbursed for any loss in their equity in a home, or for cost of cancellation of a lease (Section 11).

STUDY XVI

[fol. 138]

Section 5 (2) of the Interstate Commerce Act as amended in 1940 includes the following:

- (f) As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the (Interstate Commerce) Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

For the purpose of this study the Interstate Commerce Act provisions were applied except where the Washington conditions as modified in the Louisville and Nashville case afforded more protection. The total cost is estimated at \$3,108,187, and the calculations underlying this figure, together with the methods used and the assumptions requisite to develop these costs, are shown in Schedule A.

Payments to employees would be chargeable to operating expenses and thus become a deduction in computing Federal income taxes. At the current rate of 52%, the reduction in income taxes would be \$1,616,257, and the remaining cost of \$1,491,930, would be borne by the merged company. Interest at 5% on this amount, or \$74,597, is included in the study as an annual charge against the merger.

Merger plans have, of course, not yet progressed to the point where the effect upon specific personnel can be clarified to indicate which of those employees deprived of employment at their present location, and who are offered transfer to a different location, would be willing to make the transfer with proper compensation for moving costs, and what proportion would prefer to remain where they are and take the consolidation or separation allowance. On the basis of present limited knowledge, the range between a reasonable minimum and a reasonable maximum estimate of possible payments is wide. Our estimates have knowingly been made on

premises which would tend to produce maximum estimated costs rather than minimum, and it is quite possible that the ultimate cost will be materially less than that herein estimated.

B. Other effects of merger upon labor contracts and estimated costs of equalizing rules and rates of pay.

The payments estimated above would be handled under basic rules which have been tested and clarified over a long period of years, although still subject to modification. A second and even more difficult area of labor problems involves the consolidation of operations into a unified whole, the merging of seniority rosters into single lists of employees who would perform the consolidated operations at various points, the reconciliation of variations in rates of pay and working rules, the concentration of through traffic on the shortest or most economical joint routes resulting in transferring freight from one through line to another, etc. Agreement on these problems will be difficult on any basis, particularly so if the problems at each local point are to be settled individually. There will be interminable delays in effecting merger unless general principles on a system-wide basis can be negotiated for use in settling specific problems. As pointed out in the report proper, we believe that as soon as plans have been sufficiently crystalized, steps should be taken to advise the labor organizations of the progress made and to seek a preliminary understanding as to the basic principles to be adopted where labor is concerned.

The only factors above to which it appears possible to assign definite dollar value are the matters of rates of pay and working rules. These have been analyzed craft by craft, and it has been assumed that where system-wide differences exist the basis most favorable to the employees would become the standard of the merged company, but that existing local or point variations would be unchanged.

The estimated annual cost of equalizing the differences in rules and rates of pay is \$510,000, and when payroll taxes are added to the portion represented by wages the total estimated annual increase in costs is \$571,454.

ERIE - LACAWANNA MERGER STUDY

STUDY XVI
Schedule A

Estimated Payments to Employees Deprived of Employment
or Otherwise Adversely Affected by Merger

-1-

Number of Employees Affected	Note No.	Years After Merger					Total
		1st	2nd	3rd	4th	5th	
1. Employment at Beginning of Year		28,103	27,689	26,854	26,353	26,157	
2. Employment at End of Year		27,689	26,854	26,533	26,157	26,069	
3. Jobs Abolished	(1)	403	818	484	190	87	1,982
4. Jobs Created by Attrition	(2)	2,507	2,440	2,402	2,387	2,380	12,116
5. Displaced Employees Re-employed Locally	(3)	189	384	227	89	41	930
6. Jobs Transferred	(4)	430	958	481	191	99	2,159
7. Transfers Accepted	(4)	258	575	289	115	59	1,296
8. Transfers Refused	(4)	172	383	192	76	40	863
9. Employees Deprived of Employment	(5)	172	383	192	76	40	863
10. Jobs Created by Attrition, Not Used	(6)	2,318	2,058	2,175	2,298	2,385	11,186
11. 20% of Line 10		464	411	435	460	468	2,238
12. Employees Taking Separation Allowance	(7)	77	172	86	34	18	387
13. Employees Entitled to Consolidation Allowance	(7)	95	211	106	42	22	476
1st Year Employees		95					
2nd " "			211				
3rd " "				106			
<u>Estimated Cost of Allowances</u>							
A. Employees Deprived of Employment							
14. "Separation Allowance"	(7)						
Number		77	172	86	34	18	
Estimated Allowance		\$ 295,295	\$ 659,620	\$ 329,810	\$ 130,390	\$ 69,030	\$ 1,484,145
15. "Consolidation Allowance"	(8)						
Number		95	211	106			
Estimated Allowance							
1st Year Employees		\$ 79,895					
2nd " "			\$ 177,451				
3rd " "				\$ 89,146			
Total		\$ 79,895	\$ 177,451	\$ 89,146			\$ 346,492
B. Employees Accepting Transfer							
16. "Moving Allowance"	(9)						
Number		258	575	289	115	59	
Estimated Allowance							
Moving Cost		\$ 109,650	\$ 244,375	\$ 122,525	\$ 48,875	\$ 25,075	
Loss on Home		129,000	247,500	144,500	57,500	29,500	
Total		\$ 238,650	\$ 531,875	\$ 267,025	\$ 106,375	\$ 54,575	\$ 1,198,800
C. Employees in Worse Position							
17. "Displacement Allowance"	(10)						
Number		47	96	57	22	10	
Estimated Allowance							
1st Year Employees		\$ 11,750					
2nd " "			\$ 24,000	\$ 12,000			
3rd " "				14,250	\$ 4,750		
4th " "					5,500		
5th " "						2,500	
Total		\$ 11,750	\$ 24,000	\$ 26,250	\$ 14,250	\$ 2,500	\$ 78,750
D. Total Estimated Payments		\$ 625,590	\$ 1,392,946	\$ 712,531	\$ 251,015	\$ 126,105	\$ 3,108,187

[fol. 141]

STUDY XVI
Schedule AExplanation of Methods Used and Assumptions Made in Schedule ANote
No.

- (1) The number of jobs which would be abolished in the various studies was determined by actual count where possible. Where the number of employees was not shown, an estimate was made by dividing estimated wages saved by the average compensation for the type of employees involved. Jobs abolished, thus determined, were separated by I.C.C. wage reporting division groups by studies, and in the case of Groups I, II, and IV, Studies VIII, IX and XIV were further separated between principal locations. Jobs which would be created at various locations as a result of changes in the operations of the merged company were also shown. Officials and off-line and on-line agencies of the Traffic Department were analyzed separately.

- (2) An analysis of the employment records of both companies was made for the years 1954, 1955, and 1956 to determine the number of employees who left the service because of deaths, retirements, dismissals and resignations by I.C.C. reporting division groups. This number was related to total employees in each group to determine the per cent of attrition. Not all jobs created by attrition, however, were considered to be available to absorb employees whose jobs were abolished, since most resignations are on junior jobs and there are frequently several resignations on the same job in the same year. The following table shows the per cent of jobs created by attrition considered available.

<u>I.C.C. Group No.</u>	<u>D E S C R I P T I O N</u>	<u>Per Cent</u>
I	Executives, officials and staff assistants	100
II	Professional, clerical and general	80
III	Maintenance of way and structures	50
IV	Maintenance of equipment and stores	40
V	Transportation (other than train, engine and yard)	60
VI-a	Transportation (yardmasters, switch tenders and hostlers)	50
VI-b	Transportation (train and engine service)	50

- (3) Displaced employees at locations where the railroads have substantial forces were considered re-employed locally in jobs made available by attrition at those locations. It was assumed displaced employees at other locations would be offered transfers to locations where jobs created by attrition were available.

[fol. 142]

STUDY XVI
Schedule ANote
No.

- (4) Jobs requiring transfer were determined by actual analysis in each Group and it was assumed that only 60% of the employees would accept such jobs, with the remainder refusing transfer and accepting the allowances provided by law. Transfers were assumed to be made only within I.C.C. employee groups and in the case of Groups I, II and IV were limited by the total of new jobs created at specific locations.
- (5) Men deprived of employment are those employees who refuse transfer.
- (6) Jobs made available by attrition in any given year that were not used to provide jobs for employees whose jobs were abolished in that year were used to offer re-employment to employees whose jobs had been abolished in prior years. Within each I.C.C. Group, it was assumed that 20% of the excess jobs created by attrition in each year after the first would be at a location where they could be offered to former employees receiving allowances. Whether such employees accepted or not, they would then cease to receive allowances. Twenty per cent of the balance of jobs available by attrition were used to reduce the number of employees who would receive a displacement allowance, as described in Note (10).
- (7) It was assumed that 75% of the employees deprived of employment in the Cleveland and New York-New Jersey areas and 25% of the employees in other areas would accept separation allowances, and that the remainder would become entitled to consolidation allowances. The number of employees taking separation allowances was determined by applying weighted average per cents reflecting the above assumption within each I.C.C. Group. It was assumed the lump sum payment for employees would be based on an average of three years service, which would produce nine months' pay or \$3,819, based on average compensation for 1956.
- (8) Under the Washington Agreement the allowance was taken at 60% of the average compensation of \$5,113 for all employees for the year 1956, or \$3,068, reduced in the first year only by \$1,000 representing unemployment compensation received. It was assumed that employees losing their jobs would earn 80% of their railroad earnings from other employment in the Cleveland and New York-New Jersey areas and only 20% elsewhere, a weighted average of 64.0%. Accordingly, a deduction of \$3,272 was made for outside earnings. Only employees deprived of employment in the

[fol. 143]

STUDY - IVI
Schedule ANote
No.

first three years were protected and the period of payment was limited to 18 months, reflecting the assumed average length of service of three years.

Under the Interstate Commerce Act, the allowance was based on average compensation for all employees for 1956 of \$5,113, reduced in the first year only by \$1,000 representing unemployment compensation received. As described above, a deduction of \$3,272 was made for outside earnings. Since employees were assumed to have had an average length of service of three years, only employees deprived of employment during the first three years were given protection and all payments were terminated at the end of the third year.

- (9) Moving costs for each employee transferred were estimated at \$375 to which was added \$50 representing two days' pay, making a total of \$425.

- It was estimated that 259 homes would have to be sold at an average loss of \$2,500.

The losses described above are protected for a maximum of three years under the Washington Agreement and a maximum of four years under the Interstate Commerce Act. It was assumed, however, that the merged company would give this protection for the full period during which transfers would take place.

- (10) It was assumed that 25% of the estimated number of employees placed locally, based on the location studies described in Note (1), would be offered jobs paying less than they previously earned and that the average loss would be \$1.00 a day or \$200 a year. The allowance was not continued beyond the fifth year, as it was assumed that employees would have regained their original rates by that time. It was also assumed that in each year after the first the number of persons entitled to a displacement allowance would be reduced by 20% of the balance of jobs made available by attrition but not otherwise used.

[fol. 144]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 3

AGREEMENT

between

THE DELAWARE, LACKAWANNA AND WESTERN R. R. CO.

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EFFECTIVE JULY 14, 1941

[fol. 145]

SCOPE

The rules contained herein shall govern the hours of service, working conditions and rates of pay of the following employees in the Maintenance of Way and Structures Department:

BRIDGE AND BUILDING

Leading Mechanics, Mechanics (carpenters, iron workers, repairmen, masons, scalemen, dock builders, and painters) and their Helpers, Bridge Inspectors, Drawbridge Tenders, Drawbridge Deckmen, Floating Equipment Operators, Floating Equipment Watchmen, Pumpmen, Cooks, Assistant Cooks, Watchmen and Laborers employed in the Bridge and Building Sub-department of the Maintenance of Way and Structures Department;

TRACK

Track, Gardener, Patrol, and Repairmen Foremen and their Assistant Foremen, Rock Inspectors, Material Inspectors, Rockmen, Repairmen, Curve Liners, Assistant Repairmen, Crane Operators, Assistant Crane Operators, Truck Driver, Insulated Joint Repairmen, Crossing and

other Watchmen, Repairmen Helpers, Cooks, Assistant Cooks, Trackmen and Laborers employed in the Track Sub-department of the Maintenance of Way and Structures Department;

TREATING PLANT

Foremen, Assistant Foremen, Carpenters, Carpenter Helpers, Watchmen and Laborers employed in the Treating Plant Sub-department of the Maintenance of Way and Structures Department and assigned to work at the Federal Creosoting Plant at Paterson, New Jersey.

[fol. 146]

RULE 1

SENIORITY

Except as provided in Rule 10 (h) seniority will begin at the time the employe's pay starts in the class in the sub-department in which employed.

RULE 2

SENIORITY RIGHTS

Seniority rights accruing to employes under this agreement entitle them to consideration for positions in accordance with their relative length of service in the Maintenance of Way Department as hereinafter provided.

RULE 3

RETENTION IN FORCE REDUCTION

(a) When forces are reduced, the senior employes in the class of the sub-department on the seniority district shall be retained.

(b) Employes promoted to positions in their own sub-department in accordance with Rule 13 will continue to accumulate seniority in classes from which promoted and when force is reduced will be allowed to exercise their seniority in their former classes.

(c) Track Foremen, Assistant Track Foremen, Repairmen Foremen, Repairmen and Assistants laid off on account of force reduction will be permitted to displace junior employees in lower classes on their own seniority district in track sub-department.

(d) Thirty-six (36) hours' notice will be given before hours or forces are reduced.

[fol. 147]

DISPLACEMENT

(e) An employe will not be considered as being displaced until the individual asserting displacement rights actually starts work in this position, and notification of displacement must be given to the foreman or supervisory officer during the working hours of the day previous to starting work.

PREFERENCE

(f) Employees laid off because of force reduction will, when opportunity arises and if qualified, be given preference to employment in other classes or on other seniority districts in preference to hiring new employes, but will not establish seniority standing on other than his original roster.

REDUCTION IN FORCE

(g) Except as otherwise provided, the assignment for hourly rated employes will not be reduced below five (5) eight (8) hour days each week to avoid making force reduction, unless agreed to by Management and General Chairman.

RULE 4

SENIORITY LIMITS

(a) Seniority rights of all employes are confined to the sub-department in which employed and are restricted to the following seniority districts:

BRIDGE & BUILDING SUB-DEPARTMENT:

District 1, New York Harbor and New Jersey except the Delaware River bridges.

District 2, Pennsylvania except between M. P. 220 and M. P. 237 but including the Delaware River Bridges.

District 3, New York State and between M. P. 220 and M. P. 237 in Pennsylvania.

[fol. 148] TRACK SUB-DEPARTMENT:

District 1, to include all territory between M. P. 0 to M. P. 47 on Cut-Off. Also to M. P. 48 on Washington Line and including Main Line, Morristown Line, Montclair Branch, P. & D. Branch and Sussex Branch, also the vicinity of New York Harbor.

District 2, from M. P. 47 on Cut Off to M. P. 103. From M. P. 48 to Slateford Junction on Washington Line including Bangor and Portland Branch, Phillipsburg Branch and Hampton Branch.

District 3, from M. P. 103 to M. P. 192 including Scranton and Binghamton Yards, Montrose Branch, Old Line, and Diamond and Winton Branches.

District 4, from M. P. 192 to M. P. 294 including Ithaca Branch.

District 5, from M. P. 294 to M. P. 396 including Black Rock Branch.

District 6, from M. P. 134 to M. P. 213 on Bloomsburg Branch including Keyser Valley Branch and Hanover-Newport Branch.

District 7, from M. P. 193.37 to M. P. 306.2 at Oswego including Cincinnatus Branch.

District 8, from M. P. 202.38 to M. P. 286 at Utica including Richfield Springs Branch.

PATERSON TREATING PLANT SUB-DEPARTMENT:

One seniority district.

SYSTEM

(b) System seniority shall prevail in the following classes:

[fol. 149]

Track Sub-Department .

Repairmen Foremen
Repairmen
Assistant Repairmen
Repairmen Helper
Rock Inspectors
Rockmen

Material Inspectors
Crane Operators
Assistant Crane Operators
Curve Liners
Cooks and Assistants

RULE 5

REASSIGNMENT OR CHANGE IN FORCE

When forces are increased, when vacancies occur, when new positions are created or when displacements are to be made, employees affected, before returning to work or changing position, will present to their foreman or supervisory officer a letter from the General Chairman containing rights he may have under this agreement and if not properly assigned in accordance with such rights will be compensated for wage loss. Except for emergencies, notification of such change or increase in force will be promptly furnished the General Chairman by the Management.

Employees notified by the General Chairman to report back to work and failing to do so after ten (10) days will forfeit all seniority rights.

When forces are reduced employees affected will have the right within ten (10) days after being notified and in accordance with the foregoing procedure to displace employees having less seniority.

RULE 6

EXPENSES

Employees accepting positions in the exercise of their seniority rights will do so without causing extra expense to the railroad except as provided in these rules.

[fol. 150]

RULE 7**VOLUNTARY DEMOTION**

An employe who of his own choice desires to be demoted to a lower class will be permitted to do so in which case he shall forfeit all seniority in the higher class from which demoted. This rule does not apply to instances of temporary employment on account of sickness or for other good cause if authorized by agreement between the General Chairman and the Management.

RULE 8**IN TEMPORARY SERVICE**

An employee agreeing to accept temporary assignment by direction of the Management will retain his seniority rights and shall return to the former position at the expiration of the temporary assignment unless his position is abolished or is filled by an employe of greater seniority under displacement rules in which case he shall exercise his seniority rights in securing a position in his own seniority district. Temporary transfers under this rule will not exceed a period of ten (10) days.

RULE 9**CHANGE OF DISTRICT**

(a) There will be no change in Seniority District unless agreed to by Management and General Chairman in which case seniority rights of employes affected will be adjusted in the revised districts.

SPECIAL CASE

(b) When large gangs are assembled for rail laying, employes having seniority rights on the district where the work is being done will be afforded opportunities to perform this work. When such procedure is not practicable [fol. 151] and economical, employes from other districts

or new men will perform this work as agreed upon between the Railroad Company and the General Chairman.

[fol. 152]

RULE 11

ROSTER

(a) Seniority rosters of employes of each class in each sub-department by Seniority Districts will be separately compiled. Copies will be furnished each foreman with instructions to post same in tool houses, shops, marine equipment or outfit cars. Watchmen's roster will be posted in watch shanties. All rosters will be available for inspection by employes interested. Copies will also be furnished to employes' representatives.

SCOPE OF ROSTER

(b) Seniority Roster will show the name, classes and last date of entry of the employe into the sub-department of the Maintenance of Way Department and date of promotions except that the names of trackmen or laborers will not be included until they have worked a total of three (3) [fol. 153] months or more within a period of two (2) years. During this accumulative period trackmen or laborers will, however, be permitted to exercise such seniority as they may have acquired.

ROSTER REVISION

(c) Rosters will be revised in January and posted in March of each year and will be open to correction for sixty (60) days from date posted. Except to correct typographical errors, this sixty (60) day provision may be invoked only in the case of employes whose names appear on the roster for the first time.

NOTE—The first roster under this agreement will be posted as soon as possible, but not later than sixty (60) days from the effective date of this

agreement and will be open for correction for a period of six (6) months after posting.

[fol. 154]

RULE 13

POSTING BULLETIN

(a) When new positions are created or when vacancies occur, a bulletin will be posted promptly and in no event later than ten (10) days after the new positions have been created or the vacancies occur. Such bulletin shall show the location, descriptive title, hours of service, and rate of pay. The bulletin to be posted for a period of ten (10) days in an available location at the headquarters of the employees in the sub-department entitled to consideration in securing the positions during which time the employees may file their applications with the official whose name appears on the Bulletin with a copy to General Chairman. Temporary vacancies of ten (10) days or less duration need not be bulletined.

ASSIGNED TO POSITIONS

(b) The senior qualified applicant will be assigned to the position promptly and not later than thirty (30) days from the date the vacancy first occurred or new position was created.

MAKING KNOWN ASSIGNMENT

(c) A copy of the bulletin and notice of assignment shall be furnished to the General Chairman of the Employees' Organization and the name of the employee assigned to the position shall be posted on bulletin boards within the seniority district.

FILLING JOBS AWARDED

(d) When jobs are awarded they shall be filed within seven (7) days. In the event of the failure of the first qualified applicant to fill the same within seven (7) days,

the position shall then be awarded to the next senior qualified applicant.

[fol. 155]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 4

AGREEMENT

BETWEEN

ERIE RAILROAD COMPANY

AND

The Trustee of the Property of
THE NEW JERSEY AND NEW YORK
RAILROAD COMPANY

AND

The Crossing Watchmen, Drawbridge Engineers, and
Drawbridge Tenders Employed Thereon

Represented by the

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

Governing Hours of Service,
Working Conditions and Rates of Pay

EFFECTIVE JULY 1, 1951

[fol. 156]

RULE 3

Seniority

(a) Except as otherwise herein provided, persons entering the service of the Erie Railroad as crossing watchmen, drawbridge engineers, or drawbridge tenders, providing their applications (written or oral) are approved, will accumulate seniority from the time their pay starts in the

[fol. 157] class in which employed. Applications not disapproved within ninety (90) days will be considered accepted. In the event that applicant gives false or inadequate information as to previous employment, this rule shall not apply.

(b) Seniority rights of all employees covered by this agreement are confined to the jurisdiction of one division engineer, except that on the New York Division and New York Terminal Division, there will be one roster and this shall be considered one seniority district.

(c) It is agreed that effective with the date of this agreement drawbridge engineers will establish seniority as crossing watchmen, and it is understood that they will exercise seniority if and when forces are reduced as drawbridge engineers in accordance with the seniority they now hold as crossing watchmen.

It is further agreed that employees working as drawbridge tenders will hold and accumulate seniority rights as crossing watchmen and will be selected from the ranks of crossing watchmen.

RULE 4

Rosters

(a) A separate seniority roster will be compiled for crossing watchmen (including drawbridge tenders) and drawbridge engineers.

The seniority roster will show the name and date the employee accepted a bulletined position.

(b) Rosters will be revised and corrected during June of each year. No additions will be made to the rosters except to add names and seniority dates of new employees who acquired seniority subsequent to the posting of the previous roster or to eliminate names of those who have left the service. Protests (except for typographical errors) [fol. 158] will be confined to names and dates added since posting of previous annual roster, and such protests must be made within sixty (60) days from first posting. On proof of error, correction will be made. Where no protests

(except for typographical errors) are received within sixty (60) days from first posting, seniority dates will be considered correct and not subject to protest on any subsequent rosters unless otherwise changed by mutual agreement between the division engineer and the general chairman, or their representatives.

(c) In the event of change of seniority districts, as defined in Rule 3(b), employees transferred will maintain their original seniority date in the new seniority district. In the event two or more seniority districts are consolidated, the rosters will be combined.

RULE 5

Force Reduction

(a) When force is reduced or positions abolished, the employee affected will have the right to displace a junior employee providing he possesses the necessary qualifications.

(b) When forces are reduced, employees affected will have the right within ten (10) days after being notified of such reduction, to exercise seniority in accordance with these rules.

(c) Two (2) working days notice will be given regularly assigned employees before reduction is made and list of men laid off will be furnished by the proper officer to the local chairman. The day on which employees are notified during regular working hours will count as first day. This paragraph does not apply to men called for work in emergencies, or extra men.

(d) An employee laid off by reason of force reduction will retain his seniority rights provided that within ten (10) [fol. 159] days after being notified, he files in writing, with his supervisor, his name and address. Employees who fail to do this, or to keep the supervisor informed as to where they can be found, or who fail to return to the service within ten (10) days after being so notified by registered mail at their last known address, will forfeit all seniority rights. In case disputes arise, the records to show that the employee

has complied with this rule, will be made available to the employee's representative upon request.

(c) Employees laid off account of reduction in force will be advised on their inquiry, when the information is available, where employees junior in the service in the same class or lower classes, are located, in order to assist them in exercising their seniority rights.

RULE 6

Temporary Assignment

An employee accepting any temporary assignment on request of the Management will retain his seniority rights and may return to his former position at the expiration of the temporary assignment or he may exercise seniority to any position bulletined in his absence. If during the time an employee is filling a temporary position, his former position is abolished or is filled permanently by a senior employee in the exercise of seniority, he may exercise seniority in accordance with Rule 5(a). Temporary transfers under this rule will not exceed a period of ninety (90) days unless otherwise agreed upon between the Chief Engineer M. of W. and the General Chairman, or their designated representatives.

[fol. 160]

RULE 8

Bulletins

(a) When new positions are created or when vacancies occur bulletin will be posted promptly and in no event later [fol. 161] ~~than~~ five (5) days after the new positions have been created or the vacancies occur. Copy of such bulletin shall be furnished to Local Chairman. Such bulletins shall show the location, hours of service, and rate of pay. The bulletin to be posted for a period of ten (10) days at locations available to the employees, during which time the employees may file their applications with the official whose name appears on the bulletin.

(b) Temporary vacancies that are known to exceed thirty (30) days will be advertised in accordance with the above paragraph. Temporary vacancies of less than thirty (30) days, and of undetermined periods, need not be bulletined and will be filled by the Management from qualified available extra crossing watchmen.

(c) The senior qualified applicant will be assigned to the position promptly and not later than twenty (20) days from the date the bulletin was posted.

(d) When no applications for positions advertised under these rules are received from employees who are entitled to consideration, the positions may then be filled by the Management with qualified employees or furloughed employees from the Maintenance of Way Department or other departments when available. If not available, new men may be employed.

(e) A copy of the bulletin and notice of assignment shall be furnished to the Local Chairman and the name of the employee assigned to the position shall be posted on bulletin boards within the seniority district.

(f) When an employee bids for and is awarded a permanent position his former position will then be declared vacant and bulletined. Such an employee is not entitled to apply for the position which has just been vacated by him, [fol. 162] however, if the former position becomes vacant and is again bulletined his application will then be given full consideration.

(g) Employees awarded an advertised position will be given a fair chance to demonstrate their ability to meet the requirements of the position and, failing to qualify within thirty (30) calendar days, may return to their former position in accordance with the seniority provisions of this agreement.

[fol. 163]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 5

AGREEMENT

BETWEEN

ERIE RAILROAD COMPANY

AND

DEPARTMENT OF STRUCTURES' EMPLOYEES

Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Effective February 1, 1946

[fol. 164]

ARTICLE 1—SENIORITY

Seniority

RULE 1. Seniority in the Department of Structures will begin at the time an employee's pay starts in the occupation in which first employed, provided his application for employment has been approved. He will hold and accumulate seniority in his own occupation and all lower occupations on his seniority roster.

Seniority in higher occupations on the seniority roster will be established as of the date an employee is assigned by bulletin as the regular occupant.

Rosters

RULE 2. (a) Seniority rosters for Groups 1 and 2 will be prepared. Copies will be posted at each headquarters for

inspection by all employees and their representatives will be furnished with a copy thereof.

[fol. 165] (b) Rosters will show the name and date first employed and subsequent dates advanced in each higher occupation.

(c) The first roster will be posted for a period of ninety (90) days and will be subject to protest. Any protest must be in writing giving full particulars. If no protest is made of first seniority roster dates within the ninety (90) day period, then roster dates will be considered as correct and not thereafter subject to change.

(d) Rosters will be revised and corrected during June of each year. No additions will be made to the rosters except to add names and seniority dates of new employees who acquired seniority subsequent to the posting of the previous roster or to eliminate names of those who have left the service. Protests (except for typographical errors) will be confined to names and dates added since posting of previous annual roster, and such protests must be made within sixty (60) days from first posting. On proof of error, correction will be made. Where no protests (except for typographical errors) are received within sixty (60) days from first posting, seniority dates will be considered correct and not subject to protest on any subsequent rosters.

(e) Seniority rights of employees on the rosters will extend over the entire system.

* * * * *

[fol. 166] *Reduction in Forces*

RULE 4. (a) When it is necessary, account reduction of expenses, to reduce forces, employees affected will have the right to displace junior employees within ten (10) days or forfeit the right of displacement.

(b) An employee laid off account of reduction in force must file in writing, within ten (10) days, with the Foreman and the Supervisor of Bridges his name and address, if he desires to retain his seniority rights. Employees who

fail to keep the Foreman and the Supervisor of Bridges advised as to where they can be reached, or who fail to return to service within ten (10) days after being notified by U. S. Mail, will lose their seniority rights.

(c) When forces are reduced or positions abolished, employes will be given not less than four (4) calendar days advance notice.

ARTICLE 2—ASSIGNMENTS

Assignments

RULE 5. (a) New positions or vacancies will be promptly bulletined on standard form, as per sample incorporated in this agreement, at the fabricating yard and headquarters of each gang for ten (10) days, except that temporary vacancies because of sickness or disability of employes will not be subject to bulletin or bid until the expiration of sixty (60) days.

(b) Assignments to new positions, or to fill vacancies will be made after bulletin notice has been posted for a period of ten (10) days at the fabricating yard and headquarters of each gang, during which time employes may file their applications with the officer whose name appears on the bulletin. The selection will be made and announced before the expiration of twenty (20) days from date bulletin is posted.

The successful applicant will fill the position within ten (10) days and his position will be promptly bulletined.

New positions or vacancies may be filled temporarily pending assignment.

New positions or vacancies for which there are no qualified applicants after expiration of bulletin period shall be filled by the Management.

*(c) Assignments to positions within the scope of these rules and rates of pay shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall govern.

(d) An employe assigned to a higher rated position within the scope of these rules and rates of pay and fail-

ing to qualify within thirty (30) days may return to his former position or exercise seniority rights on any position that has been advertised in the meantime but will not acquire any seniority in the higher rated position for which he failed to qualify.

[fcl. 167] (e) Employees declining promotion or who do not bid for advertised positions shall not lose their seniority.

(f) An employe may be temporarily transferred from one gang to another when necessary to build up a gang to meet the requirements of the service in this department. Such transfer will not extend over ninety (90) days unless extended by agreement between duly authorized representative and the Management. In making such transfers the senior qualified man in the gang from which transfer is made will be given first option. Thereafter other qualified men will be given their option in turn. The junior qualified man must accept the transfer. At the end of the transfer period, such employe will return to his gang or, if his position no longer exists with that gang, exercise his seniority rights.

(g) Employees transferred by direction of the management during the regular work week will be compensated at straight time rates for all time consumed in route waiting or riding. It will be understood that when transfers are made over a week-end they will be at no expense to the Railroad.

(h) Copies of bulletins and assignments will be furnished the General Chairman.

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[fol. 168]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 6

A G R E E M E N T

BETWEEN

ERIE RAILROAD COMPANY

AND

Trustee of the Property of

THE NEW JERSEY AND NEW YORK
RAILROAD COMPANY

AND THE

Employees thereon represented by the
BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYESGoverning Hours of Service
and Rates of Pay

EFFECTIVE: JANUARY 1, 1952

[fol. 169] *Seniority*Rule 2

No seniority will be established by a new employe until his employment application is approved. Applications not disapproved within ninety (90) days will be considered accepted, except where a man makes falsification on his employment papers. When a new employe is hired in a group he will establish seniority in the class in which employed and all lower classes in that group. Employes who have established seniority in a group may make application for positions of higher rank or base pay advertised in

other groups and if they are the successful applicants they will establish seniority in the new group in the class to which transferred and all lower classes in that group as of [fol. 170] the date they are assigned to that group. They will also retain and continue to accumulate seniority in their original group. Such an employe who leaves the new group by application for position in another group or in his original group will then forfeit seniority in the new group. If such an employe is displaced he may return to his original group but will continue to retain and accumulate seniority in the new group.

No employe may hold seniority in more than two groups at any one time.

Except as hereinabove provided in Paragraph one of this rule, employes will establish seniority rights on rosters as of the day their pay starts.

When two or more employes are promoted in accordance with these rules on the same day the senior employe will be entitled to the senior rank.

When two or more employes are hired on the same day the Management will establish their rank on the roster.

Limits

Rule 3

Except as otherwise provided in Rule 2, seniority rights of employes will be confined to the jurisdictions of the following supervisory officers:

Division Engineer—Groups 1, 2, 3, 4 and 5.

Supervisor of Work Equipment and Welding—Groups 6 and 7.

Engineer M. of W.—Group 8.

NOTE: For group 8 Engineer M. of W. will put out the advertisement, bids will be sent to Supervisor of Work Equipment and Welding who will make the assignments.

[fol. 171] *Change in Seniority Districts*

Rule 4

When change is made in the limits of any seniority districts or divisions, seniority rights of employees affected can only be adjusted on the revised district or division by agreement between the management and the General Chairman or their accredited representatives.

Force Reduction

Rule 5

(a) When force is reduced, employees affected shall have the right, within ten calendar days after being notified of such reduction, to exercise seniority to displace junior employees on their own seniority district, or they forfeit displacement rights. Employees failing to exercise displacement rights will be considered as laid off and subject to paragraph (d) of this rule.

(b) Two (2) working days notice will be given employees before reduction is made and list of regular assigned roster men laid off will be furnished by the proper officer to the local chairman. The day on which employees are notified during regular working hours will count as first day. This paragraph does not apply to men called for work in an emergency.

(c) When forces are increased or when vacancies occur, employees laid off will be recalled to service in accordance with their seniority subject to paragraph (d) of this rule.

NOTE: Employees will not be required to return for work at points unreasonable distances from the regular headquarters. An employee waiving rights in such instances must do so in writing to the officer whose name appeared on the notice.

[fol. 172] (d) Employees laid off who desire to retain their seniority rights to be recalled to service must file in writing within ten (10) days with their foreman and immediate supervising officer (copy to the local chairman) their names

and addresses, also renew same upon each change of address. Failure to advise their foreman and immediate supervising officer and local chairman of a change in address or to return to the service within ten (10) days after being notified to return by United States mail at their last known address, will result in forfeiture of all seniority rights, except when otherwise agreed upon between Division Engineer and Local Chairman.

Making Promotions

Rule 6

Promotions shall be based on fitness, ability and seniority. Fitness and ability being sufficient, seniority shall govern.

[fol. 173] *Temporary Service*

Rule 10

(a) An employe agreeing to accept a temporary assignment by direction of the Management will retain his seniority rights and may return to his former position either prior to or at the expiration of the temporary assignment or may exercise seniority to any position bulletined in his absence. If during the time an employe is filling a temporary assignment his former position is abolished or is filled permanently by a senior employe in the exercise of seniority, he may exercise seniority in accordance with Rule 5(a). Such employes will not establish any seniority on other than their own home seniority district. Any such employes who decline such temporary assignments or transfers may exercise their home seniority district rights.

[fol. 174] *Seasonal Service*

(b) When an employe bids for and is awarded a seasonal position as Assistant Extra Gang Foreman and such sea-

sonal assignment terminates, he will have the right to displace a junior employe of the same class on his own seniority district; otherwise, he may return to his former position and location. If his former position ~~does not exist~~ he then may exercise seniority in accordance with Rule 5(a).

Rosters

Rule 11

A separate seniority roster will be compiled for each group of employes on each seniority district. Rosters will show group, class, name, date of entry of the employe into the M. of W. Department and dates of promotion to higher classes except that the names of section men and laborers will not be included until they have worked a total of six (6) months or more within a period of two (2) consecutive years. During this accumulative period section men and laborers will however, be permitted to exercise such seniority as they may have acquired.

Roster Revision

Rule 12

Rosters will be revised in June of each year and held open for correction for a period of sixty (60) days from date posted in toolhouses or headquarters of each gang. If request for correction is not received by the supervisory officers under whose jurisdiction the seniority roster is maintained within the 60-day period, the roster date will stand as permanently established unless changed by mutual agreement between the division engineer and local chairman. Corrected rosters will be posted not later than October 1 of each year.

[fol. 175] *Bulletining of Positions*

Rule 14

(a) When new positions are created or when permanent vacancies occur bulletin will be posted promptly and in no

event later than five (5) days after the new positions have been created, or the vacancies occur. Such bulletin shall show the location, descriptive title, hours of service and rate of pay. Copy of bulletin shall be furnished to local chairman. The bulletin shall be posted for a period of ten (10) days at locations available to employees on the seniority district during which time the employees may file their applications with the official whose name appears on the bulletin. New positions or vacancies may be filled temporarily by the management pending permanent assignment.

(b) Temporary vacancies that are known to exceed thirty (30) days will be advertised in accordance with the above paragraph. Temporary vacancies of less than thirty (30) days, and of undetermined periods, need not be bulletined and may be filled by the Management. Such vacancies of undetermined periods that extend beyond thirty (30) days will be advertised in accordance with paragraph (a).

(c) The senior qualified applicant will be assigned to the position promptly and not later than twenty (20) days from the date the bulletin was posted.

(d) When no application for positions advertised under these rules are received from employees who are entitled to consideration, the positions may then be filled by the management with qualified employees or furloughed employees from the Maintenance of Way Department or other departments, when available. If not available, new men may be employed.

[fol. 176] (e) The name of the employee assigned to the position shall be posted at locations available to employees within the seniority district and a copy of such notice of assignment shall be furnished to local chairman.

(f) When an employee bids for and is awarded a permanent position his former position will then be declared vacant and bulletined. Such an employee is not entitled to apply for the position which has just been vacated by him, however, if the former position becomes vacant and is again bulletined his application will then be given full consideration.

(g) Positions of extra gang foremen will not be subject to bid, but when extra gangs are to be organized the extra gang foremen will be selected from qualified employees by the management. The acceptance of the position is optional with the employee.

(h) A section foreman handling a gang of seventeen (17) or more men for a period of twenty (20) consecutive working days or more will receive the extra gang foreman's rate for the period.

[fol. 176a]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFF'S EXHIBIT 7

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Washington Job Protection Agreement of May 1936 3

Employe Protections Prescribed by ICC—

Chicago & Northwestern Railway Case 20

New Orleans Union Passenger Terminal Case 21

Oklahoma Railway Case 23

Chicago, Burlington & Quincy Railroad Case 26

[fol. 177]

AGREEMENT OF MAY, 1936, WASHINGTON, D. C.

This agreement is entered into between the carriers listed and defined in Appendices "A", "B" and "C" attached hereto and made a part hereof, represented by the duly authorized Joint Conference Committee signatory hereto, as party of the first part, and the employes of said carriers, represented by the organizations signatory hereto by their respective duly authorized executives, as party of the second part, and, so far as necessary to carry out the provisions hereof, is also to be construed as a separate agreement by and between and in behalf of each of said carriers and its employes who are now or may hereafter be represented by any of said organizations which now has (or may hereafter have during the life of this agreement) an agree-

ment with such carrier concerning rates of pay, rules or working conditions.

The signatories hereto, having been respectively duly authorized as aforesaid to negotiate to a conclusion certain pending issues concerning the treatment of employes who may be affected by coordination as hereinafter defined, hereby agree:

Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore, the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement.

Section 2 (a). The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein when it refers to other than parties to this agreement means any carrier subject to the provisions of Part I of the Interstate Commerce Act; when it refers to a party to this agreement it means any company or system listed and described in Appendices "A", "B" or "C" as a single carrier party to this agreement.

(c) The term "time of coordination" as used herein includes the period following the effective date of a coordination during which changes consequent upon coordination are being made effective; as applying to a particular employee it means the date in said period when that employee is first adversely affected as a result of said coordination.

Section 3 (a). The provisions of this agreement shall be effective and shall be applied whenever two or more carriers parties hereto undertake a coordination; and it is understood that if a carrier or carriers parties hereto undertake a coordination with a carrier or carriers not parties hereto, such coordination will be made only upon the basis of an agreement approved by all of the carriers parties thereto and all of the organizations of employees involved (parties hereto) of all of the carriers concerned. No coordination involving classes of employees not represented by any of the organizations parties hereto shall be

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[fol. 178] undertaken by the carriers parties hereto except in accord with the provisions of this agreement or agreements arising hereunder.

(b) Each carrier listed and established as a separate carrier for the purposes of this agreement, as provided in Appendices "A", "B" and "C", shall be regarded as a separate carrier for the purposes hereof during the life of this agreement; provided, however, that in the case of any coordination involving two or more railroad carriers which also involves the Railway Express Agency, Inc., the latter company shall be treated as a separate carrier with respect to its operations on each of the railroads involved.

(c) It is definitely understood that the action of the parties hereto in listing and establishing as a single carrier any system which comprises more than one operating company is taken solely for the purposes of this agreement, and shall not be construed or used by either party hereto to limit or affect the rights of the other with respect to matters not falling within the scope and terms of this agreement.

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employees of each such carrier and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employees of each class affected by the in-

tended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 6 (a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of

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[fol. 179] the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what

is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner herein-after described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

• (c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

Section 7 (a).. Any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service, which (except in the case of an employee with less than one year of service) shall be a monthly allowance equivalent in each instance to sixty per cent (60%) of the average monthly compensation of the employee in question during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the coordination. This coordination allowance will be made to each eligible employee while unemployed by his home road or in the coordinated operation during a period beginning at the date he is first deprived of employment as a result of the coordination and extending in

each instance for a length of time determined and limited by the following schedule:

<i>Length of Service</i>	<i>Period of Payment</i>
1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 "	12 "
3 yrs. " " " 5 "	18 "
5 yrs. " " " 10 "	36 "
10 yrs. " " " 15 "	48 "
15 yrs. and over	60 "

In the case of an employee with less than one year of service, the total coordination allowance shall be a lump sum payment in an amount equivalent to sixty (60) days pay at the straight time daily rate of the last position held by him at the time he is deprived of employment as a result of the coordination.

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[fol. 180] (b) For the purposes of this agreement the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:

1. When the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, or

2. When the position he holds on his home road is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of said coordination, or by other employees, brought about as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his home road or a position in the coordinated operation:

(d) An employee shall not be regarded as deprived of employment in case of his resignation, death, retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furloughed because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of a particular coordination who is not deprived of his employment within three years from the effective date of said coordination.

(e) Each employee receiving a coordination allowance shall keep the employer informed of his address and the name and address of any other person by whom he may be regularly employed.

(f) The coordination allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the coordination allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a coordination allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a coordination allowance accordingly if any is due.

(g) An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and

such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of

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[fol. 181] residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(h) If an employee who is receiving a coordination allowance returns to service the coordination allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a coordination allowance. During the time of such reemployment however he shall be entitled to protection in accordance with the provisions of Section 6.

(i) If an employee who is receiving a coordination allowance obtains railroad employment (other than with his home road or in the coordinated operation) his coordination allowance shall be reduced to the extent that the sum total of his earnings in such employment and his allowance exceeds the amount upon which his coordination allowance is based; provided that this shall not apply to employees with less than one year's service.

(j) A coordination allowance shall cease prior to the expiration of its prescribed period in the event of:

1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h).
2. Resignation.
3. Death.
4. Retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

Section 8: An employee affected by a particular coordination shall not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief, etc., under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

Section 9. Any employee eligible to receive a coordination allowance under section 7 hereof may, at his option at the time of coordination, resign and (in lieu of all other benefits and protections provided in this agreement) accept in a lump sum a separation allowance determined in accordance with the following schedule:

<i>Length of Service</i>	<i>Separation Allowance</i>
1 year & less than 2 years	3 months' pay
2 years " " 3 "	6 " "
3 " " " 5 "	9 " "
5 " " " 10 "	12 " "
10 " " " 15 "	12 " "
15 years and over	12 " "

In the case of employees with less than one year's service, five days' pay, at the rate of the position last occupied, for each month in which they performed service will be paid as the lump sum.

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{fol. 182} (a) Length of service shall be computed as provided in Section 7.

(b) One month's pay shall be computed by multiplying by 30 the daily rate of pay received by the employee in the position last occupied prior to time of coordination.

Section 10 (a) Any employee who is retained in the service of any carrier involved in a particular coordination (or who is later restored to service from the group

of employees entitled to receive a coordination allowance) who is required to change the point of his employment as result of such coordination and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, (not to exceed two working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier responsible and the organization of the employee affected. No claim for expenses under this Section shall be allowed unless they are incurred within three years from the date of coordination and the claim must be submitted within ninety (90) days after the expenses are incurred.

(b) If any such employee is furloughed within three years after changing his point of employment as a result of coordination and elects to move his place of residence back to his original point of employment, the carrier shall assume the expense of moving his household and other personal effects under the conditions imposed in paragraph (a) of this section.

(c) Except to the extent provided in paragraph (b) changes in place of residence subsequent to the initial changes caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 11 (a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of any of the carriers involved in a particular coordination (or who is later restored to such service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as a result of such

coordination and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the coordination to be unaffected thereby. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.
2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

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[fol. 183] 3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this Section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within three years after the effective date of the coordination.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they

are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively; these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser, and in the event of failure to agree then the Chairman of the Interstate Commerce Commission shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 12. If any carrier shall rearrange or adjust its forces in anticipation of a coordination, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this agreement as an employee immediately affected by a coordination, this agreement shall apply to such an employee as of the date when he is so affected.

Section 13. In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement (or of the agreement entered into between the carriers and the representatives of the employees relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement. Each party to this agreement may name such persons from time to time as each party desires to serve on such Committee as its representatives in substitution for such original members.

Should the Committee be unable to agree, it shall select a neutral referee and in the event it is unable to agree

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[fol. 184] within 10 days upon the selection of said referee, then the members on either side may request the National Mediation Board to appoint a referee. The case shall again be considered by the Committee and the referee and the decision of the referee shall be final and conclusive. The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Section 14. Any carrier not initially a party to this agreement may become a party by serving notice of its desire to do so by mail upon the members of the Committee established by Section 13 hereof. It shall become a party as of the date of the service of such notice or upon such later date as may be specified therein.

Section 15. This agreement shall be effective June 18, 1936, and be in full force and effect for a period of five years from that date and continue in effect thereafter with the privilege that any carrier or organization party hereto may then withdraw from the agreement after one year from having served notice of its intention so to withdraw; provided, however, that any rights of the parties hereto or of individuals established and fixed during the term of this agreement shall continue in full force and effect, notwithstanding the expiration of the agreement or the exercise by a carrier or an organization of the right to withdraw therefrom.

This agreement shall be subject to revision by mutual agreement of the parties hereto at any time, but only after the serving of a sixty (60) days notice by either party upon the other.

NEW ORLEANS UNION PASSENGER TERMINAL CASE

Finance Docket No. 15920.

Decided January 16, 1952

... From the beginning, we have patterned the conditions which we prescribed after the Washington Agreement. Since the enactment of section 5(2) (f), the conditions prescribed by us differed from that agreement as to when the protection afforded was to begin, the duration thereof, and the amount of the annual allowance to be made because all such matters were regarded as being fixed by the statute. Under the circumstances here present, some additional protection for the employes involved must be afforded. In our opinion the Washington Agreement, subject to the limitations later shown, would provide the fair and equitable arrangement contemplated by the statute.

One provision of the Washington Agreement, to which specific objection has been raised by the applicants has never had our approval. It provides, in effect, that the coordination allowance to which an employe is entitled in case of dismissal will be reduced by the amount of compensation he receives from other railroad employment, but not otherwise. We have consistently required that there be appropriate deductions for earnings in all outside employment. See *Chicago R. A. & G. Ry. Co. Trustees Lease, supra*, *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285, *Chicago M., St. P. & P. R. Co. Trustees Construction*, 252 I.C.C. 49 and 287, *Chicago & N. W. Ry. Co. Trustees Abandonment*, 254 I.C.C. 820 (not printed in full), *Oklahoma Ry. Co. Trustees Abandonment, supra*, and *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700. Accordingly, all earnings from outside employment should be included in computing any employe allowances which may be provided herein. Condition No. 5 of *Oklahoma Ry. Co. Trustees Abandonment, supra*, which relates to compensation for dismissed employes contains the following pertinent provision:

The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. * * *

The dismissal allowance, as used in the foregoing, has the same meaning as coordination allowance, as used in the Washington Agreement.

Based upon the conclusions stated herein and consistent with the circumstances in this proceeding and in conformity with the decision of the Supreme Court of the United States in *Railway Labor Assn. v. U. S.*, *supra*, we find that a fair and equitable arrangement for protecting the interests of the employees adversely affected by the transaction herein will be provided by applying the terms of the Washington Agreement of May 21, 1936, subject to the following limitations or restrictions:

(a) That employees adversely affected within 4 years from the effective date of the order approving the transaction shall receive as a minimum the protection afforded by conditions 4 to 9, inclusive, in *Oklahoma Ry. Co. Trust*—

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[fol. 186] *tees Abandonment*, 257 I.C.C. 177 (197-201), as prescribed in the report and order approving the transaction, for the period they are adversely affected prior to May 17, 1952 (4 years from the effective date of the order of approval), and any such employee so adversely affected who has received under such conditions total dismissal or displacement compensation less than that which he would receive by applying the Washington Agreement, as limited, for the full protective period therein provided from the time he is first adversely affected, shall continue to receive benefits under the terms of the Washington Agreement, as limited, until the total compensatory benefits provided therein for his particular period of service have been paid.

(b) That in applying the Washington Agreement the coordination allowance provided therein for dismissed employees shall be reduced with respect to any employee who is otherwise employed to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his coordination allowance, exceed the amount upon which his coordination allowance is based; such employee or his representative, and the carriers, to agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

The intent and effect of the foregoing findings are that all employees adversely affected by the transaction involved should receive the protection afforded by the Washington Agreement, reduced as to dismissed employees to the extent that they receive compensation in other employment or under unemployment insurance laws; and that employees adversely affected prior to May 17, 1952 (4 years from the effective date of the order of approval) are to receive as a minimum the protection afforded by the Oklahoma Conditions as prescribed in the previous report for the period they are adversely affected prior to May 17, 1952, but if the total amount of such compensation is less than they would receive under the Washington Agreement, as limited, applied from the date of adverse affect, then they are entitled to the remaining benefits they would have enjoyed under the latter. While it is unlikely under the existing circumstances that the situation will arise, should the amount of compensation to which an employee is entitled under the original Oklahoma conditions applied to May 17, 1952, equal or exceed the amount to which he would be entitled under the Washington Agreement, as limited, then he would be entitled to nothing under the latter.

An appropriate order will be entered.

COMMISSIONER CROSS did not participate in the disposition of this proceeding.

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CONDITIONS FOR PROTECTION OF EMPLOYEES, COMMONLY REFERRED TO AS THE "OKLAHOMA CONDITIONS," PRESCRIBED BY THE I.C.C. IN ITS ORDER ISSUED MAY 17, 1944 IN FINANCE DOCKET 14221, OKLAHOMA RAILWAY COMPANY TRUSTEES ABANDONMENT OF OPERATION, ETC.

4. If, as a result of the abandonment of operation herein permitted and the purchases, etc., herein authorized, hereinafter referred to as the transaction, any employee of Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Company, of The Atchison, Topeka and Santa Fe Railway Company, or of Joseph B. Fleming and Aaron Colnon, trustees of The Chicago, Rock Island and Pacific Railway Company, hereinafter respectively referred to as the Oklahoma, the Santa Fe and the Rock Island, and collectively as the carriers, is displaced, that is placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of this transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position,

but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position; provided, however, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee, provided, further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance, and provided, further, that no allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Oklahoma, with the Santa Fe or Rock Island if either of said two last named carriers offers him a position, the duties of which he is qualified to perform. The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order.

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[fol. 188] 5. If, as a result of the transaction herein approved, any employee, hereinafter referred to as a dismissed employee, of the carriers is deprived of employment with said carriers because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as result of the transaction herein approved, he shall be accorded a monthly dismissal allowance equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of this transaction. This allowance shall be made during the protective period to each dismissed employee while unemployed, provided, however, that no such allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island, if

either of said two last named carriers offers him a position, the duties of which he is qualified to perform.

The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, should agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

6. No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

7. Any employee retained in the services of the carriers involved in the transaction herein approved or who is later restored to service after being entitled to receive a dismissal allowance, and required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carriers to be agreed upon in

advance by the said carriers and the employees affected; provided, however, that changes in place of residence, subsequent to the initial change caused by the transaction, which result from the exercise by the employee of his seniority rights shall not be considered as within the foregoing provision.

8. In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing Conditions Nos. 4, 5, 6, and 7, which cannot be settled by

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[fol. 189] the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representatives.

9(a) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction herein approved and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to May 17, 1943, to be unaffected by the filing of the applications herein. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may

have in the home and in addition shall relieve him from any further obligation under the contract.

3. If the employee holds unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the consummation of the transaction herein approved and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within one year after the date employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively, and these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expense of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

[fol. 190]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES and
RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor,
Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, and DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY and ERIE RAILROAD COMPANY, Inter-
venors, Defendants.

TEMPORARY RESTRAINING ORDER—October 14, 1960

At a session of said Court held at Detroit, Michigan, on
the 14th day of October, 1960.

Present Honorable Thomas P. Thorton, District Judge.

Plaintiff Brotherhood of Maintenance of Way Employees
having filed its Complaint challenging an order of the
defendant Interstate Commerce Commission (entered
September 13, 1960 effective October 15, 1960) approving
of a merger of the Delaware, Lackawanna and Western
Railroad Company and the Erie Railroad Company, and
said railroad companies having intervened as additional
parties defendant and the Railway Labor Executives'
Association having intervened as an additional party
plaintiff, and said plaintiffs having applied for the issu-
ance of an order restraining the operation of the said
merger order until plaintiff's application for an inter-
locutory injunction can be heard and determined by a
three-judge court in accordance with 28 USC §§2284 and
2335, all of the defendants having been given notice of the
hearing on said application for restraining order, said

application having come on for hearing, evidence having been taken and counsel for all of the parties having been heard, and

Plaintiffs having requested that said merger order be [fol. 191] restrained only insofar as it adversely affects the employment of employees represented by Plaintiffs, and.

Plaintiffs and said railroad defendants having agreed that on October 17, 1960 the merged company, Erie-Lackawanna Railroad Company (Erie-Lackawanna) will take into its active employment all employees of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company, represented by the Brotherhood of Maintenance of Way Employees (BOMW) or any other labor organization whose chief executive is a member of the Railway Labor Executives Association (RLEA), who had an active employment status (i.e. not on furlough) on October 12, 1960; this provision not to adversely affect the rights of employees of the Erie or the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who were on furlough on October 12, 1960

It Is Ordered That:

The Erie-Lackawanna shall not abolish the position of, or furlough, any employee represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who had an active employment status with either the Erie or the Lackawanna railroad companies on October 12, 1960, by reason of the merger of these railroad companies, pending the entry of further order by this court, sitting as a statutory three-judge court in this proceeding.

This restraining order shall not prevent the Erie-Lackawanna from consolidating any functions of the merged company and transferring such positions as are required for such consolidations, but no employee of the Erie or of the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA holding an active employment status on October

12, 1960 shall be required to transfer his place of employment pending the entry of a further order by this court sitting as a statutory three-judge court in this proceeding, except pursuant to the terms of an interim and/or implementing agreement with the appropriate collective bargaining representative representing such employee pursuant to the provisions of the Railway Labor Act, provided, that nothing in this order shall supersede any interim and/or implementing agreement which heretofore may have been entered into between the Erie and/or the Lackawanna and any such collective bargaining representative.

The Court specifically finds that unless this restraining order is issued, irreparable damage will result to the employees represented by said plaintiffs, which finding is based upon the testimony and exhibits of Harold C. Crotty that the merger, if not so restrained, will cause the dislocation and displacement of some of such employees by the abolition of employment, the required exercise of seniority rights, the movements of employees and their families, and the loss of fringe benefits and annuity rights by some employees and that if such effects are not restrained it will be impossible to subsequently restore the status quo.

Thomas P. Thornton, District Judge.

[fol. 193]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, and
RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor,
Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, and THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY and ERIE RAILROAD COM-
PANY, Intervenor, Defendants.

ORDER AUTHORIZING SUBSTITUTION AND REDESIGNATION
OF PARTIES—October 27, 1960

At a session of said Court held in the Federal Building,
Detroit, Michigan on October 27, A. D. 1960.

Present: The Honorable Thomas P. Thorton, District
Judge.

Upon Motion of Erie-Lackawanna Railroad Company
and the consent thereto by Plaintiffs and Defendants,
United States of America and Interstate Commerce Com-
mission, and this Court being fully advised in the premises,

It Is Ordered That:

- (1) Erie-Lackawanna Railroad Company be and is
hereby designated as intervening defendant in the
place and stead of Erie Railroad Company and The
[fol. 194] Delaware, Lackawanna and Western Rail-
road Company,
- (2) the title of this action be amended accordingly and

(3) the action otherwise be continued without prejudice to any proceedings already had therein.

Thomas P. Thornton, District Judge.

[fol 195] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

—against—

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

AMENDED ANSWER OF INTERVENER DEFENDANT ERIE-
LACKAWANNA RAILROAD COMPANY —Filed October 31, 1960.

Now Comes Erie Lackawanna Railroad Company, intervenor defendant in the above entitled cause by virtue of an Order authorizing the intervention of The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company, its predecessors in interest, dated and filed October 10, 1960, and a further Order dated and filed October 27, 1960, ordering the substitution of Erie-Lackawanna Railroad Company as successor in interest to The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company, by their undersigned attorneys

and makes its amended answer to the complaint herein as follows:

[fol. 196] (1) In response to paragraph 5, states that The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company had collective bargaining agreements with the Brotherhood of Maintenance of Way Employees (BMWE), which agreements speak for themselves and refers to said agreements for the terms and provisions thereof.

(2) In response to paragraph 6, admits that the Railway Labor Executives Association (RLEA) was an intervening party before the Interstate Commerce Commission in Finance Docket No. 20707, but neither admits nor denies that the RLEA represented the interests of any of the employees of Erie Railroad Company or The Delaware, Lackawanna and Western Railroad Company.

(3) In response to paragraph 8, admits the allegations therein, except for the accuracy of the specific figures set forth in the last sentence thereof.

(4) In response to paragraph 9, admits that RLEA intervened in the proceedings before the Commission hereinabove described, but neither admits nor denies that RLEA represented the chief executive officers of railway labor unions in that proceeding and further denies each and every other allegation contained therein.

(5) In response to paragraphs 10, 11, 12, 14 and 15, denies each and every allegation contained therein.

(6) In response to paragraph 13, denies each and every allegation contained therein, except with respect to the submission of Exhibit No. H-48, and further states that such exhibit speaks for itself.

(7) In response to paragraph 16, denies that plaintiffs pursued their administrative remedies before the Commission and, further, specifically denies that BMWE, RLEA or any former employees of The Delaware, Lackawanna and Western Railroad Company or Erie Railroad Company, or present employees of Erie-Lackawanna Rail

road Company, allegedly represented by them herein have no adequate remedy at law:

Wherefore, Erie-Lackawanna Railroad Company requests that this Court deny each and all of the plaintiff's and intervenor plaintiff's requests for relief and dismiss this action with prejudice and that the Court grant such other and further relief as to it may seem just.

Rowland L. Davis, Jr., 140 Cedar Street, New York
6, New York.

Cravath, Swaine & Moore, by Ralph L. McAfee, A
Member of the Firm, 15 Broad Street, New York
5, New York.

Bodman, Longley, Bogle, Armstrong & Dahling, by
Richard D. Rohr, A Member of the Firm, 1400
Buhl Building, Detroit 26, Michigan.

Attorneys for Intervenor Defendant.

Dated: October 27, 1960

[fol. 198] *Duly sworn to by Rowland L. Davis, Jr., jurat
omitted in printing.*

[fol. 199]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff.

v.

UNITED STATES OF AMERICA, and INTERSTATE
COMMERCE COMMISSION, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA
AND THE INTERSTATE COMMERCE COMMISSION
—Filed November 3, 1960

The United States of America and the Interstate Commerce Commission, defendants in the above-styled proceeding, for answer to the complaint say:

I.

Admit the allegations of paragraphs 1 and 2, which allege that this is an action to set aside, enjoin, suspend and annul an order of the Commission as stated therein, pursuant to provisions 28 U.S.C. 1336, 1398, 2321-2325 and 2284 inclusive.

II.

Neither admit nor deny the allegations in paragraphs 3, 4, 5, and 6 for lack of sufficient information to form a belief thereon, except that it is admitted that RLEA was an intervening party in Interstate Commerce Commission Finance Docket 20707.

III.

Admit the allegations of paragraph 7 and add that the Interstate Commerce Commission is a defendant by right pursuant to 28 U.S.C. 2223.

[fol. 200]

IV.

Admit the allegations of paragraph 8 except that the accuracy of the specific figures set forth in the last sentence is neither admitted nor denied.

V.

Answering the allegations of paragraphs 9 through 13, defendants aver that the matters set forth therein, except for the first sentence of paragraph 9, and paragraph 10, are conclusions of law, argumentative in nature, requiring no answer; and admit the allegations of the first sentence of paragraph 9, and those of paragraph 10 to the extent that it properly sets out the text of Section 5(2)(f) of the Interstate Commerce Act which is involved in the action of the Commission here in issue.

VI.

Deny each and every allegation of paragraphs 14, 15 and 16, except that they admit that the plaintiffs are now entitled to maintain this action as to matters which they raised before the Commission.

VII.

Except as expressly admitted herein, each and every allegation of the complaint is denied.

Richard H. Stern, Attorney, Department of Justice,
Washington 25, D. C., Robert A. Bicks, Assistant
Attorney General, Attorneys for United States of
America.

Leonard S. Goodman, Attorney, Interstate Com-
merce Commission, Washington 25, D. C., Robert
W. Ginnane, General Counsel, Attorneys for In-
terstate Commerce Commission.

[fol. 201] Certificate of Service (omitted in printing).

3

[fol. 202]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant.

STIPULATION OF COUNSEL RE RECORD—November 4, 1960

In view of the issue raised by the complaint herein, only a limited portion of the record before the Interstate Commerce Commission in the proceeding known as Finance Docket No. 20707 is required to be brought before the Court, and accordingly

It Is Hereby Stipulated and Agreed that the following nine items shall constitute all of the record before the Interstate Commerce Commission required to be brought before the Court on appeal in this proceeding and that the same need not be certified:

(1) the joint application of the petitioners, The Delaware, Lackawanna and Western Railroad Company and the Erie Railroad Company in Finance Docket No. 20707;

(2) the returns to questionnaire filed by The Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company in Finance Docket No. 20707;

[fol. 203] (3) the petition of the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(4) the order permitting the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(5) the direct testimony of William Wyer in Finance Docket No. 20707 with respect to the issue raised by the complaint herein, including his statement G and the cross-examination of William Wyer on behalf of Railway Labor Executives' Association, being pages 122-123, 611-635 of the Transcript, in Finance Docket No. 20707;

(6) Wyer's Exhibit H-48;

(7) oral argument in Finance Docket No. 20707 before the full Commission on behalf of the Railway Labor Executives' Association and on behalf of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company, with respect to the issue raised by the complaint herein, being pages 1731-1740, 1771-1792, 1792-1799, 1805-1806, of the Transcript;

(8) Examiner's Proposed Report in Finance Docket No. 20707 served March 30, 1960; and

(9) Report of the Commission and Certificate and Order, dated September 13, 1960, in Finance Docket No. 20707.

It Is Further Hereby Stipulated and Agreed that after the record in Finance Docket No. 20707 was closed on October 22, 1959, Railway Labor Executives' Association raised before the Hearing Examiner in a brief filed on November 23, 1959 and later before the Interstate Commerce Commission the sole issue to be litigated in this action, namely, the interpretation of the mandatory requirements of Section 5(2)(f).

Dated: November 4, 1960.

George E. Brand, George E. Brand, Jr., William G. Mahoney, Counsel for Brotherhood of Maintenance of Way Employees, By George E. Brand.

[fol. 204] George E. Brand, George E. Brand, Jr.,
William G. Mahoney, Counsel for Railway Labor
Executives' Association, By George E. Brand.

Richard H. Stern, Counsel for United States of
America.

Robert W. Ginnane, Counsel for Interstate Com-
merce Commission.

Richard D. Rohr, Counsel for Erie-Lackawanna
Railroad Company.

So Ordered:

Thomas P. Thornton, U.S.D.J.

[fol. 205] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant.

Transcript of Proceedings—November 15, 1960

Proceedings had in the above-entitled matter at Detroit,
Michigan, on Tuesday, November 15, 1960, at nine-thirty
o'clock in the forenoon.

Before:

Hon. Clifford O'Sullivan, Judge, United States Court of Appeals, Sixth Circuit.

Hon. Theodore Levin, Chief Judge, United States District Court, Eastern District of Michigan.

Hon. Thomas P. Thornton, Judge, United States District Court, Eastern District of Michigan.

[fol. 206]

APPEARANCES:

William G. Mahoney, Esq., George E. Brand, Esq., and George E. Brand, Jr., Esq., Appearing on behalf of the Plaintiff.

Richard Stern, Esq., and Orrin C. Jones, Appearing on behalf of the Defendant, United States of America.

Robert W. Ginnane, Esq., Appearing on behalf of the Defendant, Interstate Commerce Commission.

Rowland L. Davis, Jr., Esq., Messrs. Bodman, Longley, Bogle, Armstrong & Dahling (By Richard D. Rohr, Esq.), Appearing on behalf of the Intervenor, Delaware, Lackawanna & Western Railroad Company and Erie Railroad Company.

[fol. 207] COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Rohr: For the Erie-Lackawanna.

There are at least a couple of matters which you might like to clarify in the interest of proper and orderly procedure.

First of all, a record was submitted to this Court last week which contained various materials submitted to the [fol. 208] Commission. Subsequently, in the brief of the RLEA, numerous factual statements are made which have no support in that record, and a memorandum was delivered to us the other day which supported this extrapolation of the evidence and record before this Court.

I think, perhaps, Mr. Ginnane of the ICC and I would both be interested in speaking in response to that memorandum and ascertaining at the outset just what is before this Court in the way of a record, and what is properly before the Court.

Hon. Clifford O'Sullivan: Well, at the moment we, of course, have the—at least as far as has been delivered to me—we have the pleadings in this case, and I assume those pleadings, by reference, to include the record that was made before the Interstate Commerce Commission, the hearing.

Mr. Rohr: Yes.

Hon. Clifford O'Sullivan: Then, also, there has been delivered the pleadings that were part of the record of the Interstate Commerce Commission.

Mr. Rohr: That is correct.

Hon. Clifford O'Sullivan: The petition, and that sort of thing. And various reports, and an intermediate report.

I don't understand that we have yet had submitted to us [fol. 209] a transcript of the evidence of witnesses.

Now, I assume that if any party wishes this Court to consider directly parts of the transcript, at least they should be pointed out to the Court; and, if the other party feels that that calls for them calling this Court's attention to additional parts of the transcript, they will do so.

However, may I ask this question: do counsel here involved believe that this Court as composed is going to in any way have to resolve issues of fact beyond possibly drawing some inferences from agreed facts?

Mr. Mahoney: No, your Honor.

Mr. Rohr: No. We believe that an issue of law is here involved, purely and simply. However, the stipulation was to that effect.

However, the brief filed by the RLEA is replete with various factual references to a transcript made before Judge Thornton on October 12th which we believe is not properly before the Court in connection with the narrow issues of law involved.

Hon. Clifford O'Sullivan: Of course, Judge Thornton would be aware of that. But, as I understand it, whatever evidence was offered before Judge Thornton related to the application for restraint.

Mr. Rohr: It spoke solely to that point, yes.
 [fol. 210] Hon. Clifford O'Sullivan: I think we ought to understand that. Even though that evidence was additional to evidence that was offered before the Interstate Commerce Commission, your position is that that evidence could not be considered by us on the point of the final decision, or our disposition of the Interstate Commerce Commission's Order?

Mr. Ginnane: That is correct, sir. It is our position that, now that your Honors are convened to determine the validity of the Commission's Order on its merits, that that determination should be made, under a great mass of authority, solely on the record made before the Commission.

Now, in support of his memorandum that the testimony of Mr. Crotty before Judge Thornton now, at this point, be made a part of the record before the Court, plaintiffs have submitted a memorandum in which they rely heavily upon a so-called Idaho case.

Hon. Clifford O'Sullivan: A so-called what?

Mr. Ginnane: Idaho case. United States vs. State of Idaho.

Hon. Thomas P. Thornton: I am just distributing some briefs that came in after I distributed the original pleadings and briefs.

Mr. Ginnane: With the Court's permission, I would like [fol. 211] to submit to the Court copies of a hastily-prepared memorandum in response to the plaintiff's memorandum.

Hon. Clifford O'Sullivan: You may submit those. You will serve them on counsel, I assume.

(Documents were thereupon handed by Mr. Ginnane to the Court and counsel.)

Hon. Clifford O'Sullivan: Do you think we better rule upon the question of whether or not this Court's consideration in this matter is to be limited to the record made before the Interstate Commerce Commission, unaided or unaffected by oral testimony that may have been given to support the application?

Mr. Ginnane: We respectfully urge the Court to do that.

Hon. Clifford O'Sullivan: What is plaintiffs' position in that connection?

Mr. Mahoney: Your Honor, we feel this way about it: this Complaint asks, in addition to a temporary restraining order, which was issued, a temporary injunction and permanent injunction.

Now, of course, Mr. Crotty's testimony as to the effect of the Commission's Order on employees would be as pertinent and applicable to our request for a temporary and permanent injunction as it was to a temporary restraining order. That is our first point.

[fol. 212] And, therefore, we feel certainly, insofar as that request of the Complaint is concerned, that his testimony could and should be considered by the Court here.

Secondly, we feel that the testimony of Mr. Crotty which related to the effect of the ICC Order on the employees and the practical effect of these compensation protective conditions for employees which the Commission imposed, that his testimony as to that should also be considered here because it merely amplifies what was already in the record, and that is the basis of the citation of the Idaho case, as Mr. Ginnane characterized it.

There the Court said—

Hon. Clifford O'Sullivan: (Interposing) The Idaho case, is this an authority cited in a recently filed brief?

Mr. Mahoney: Yes.

Hon. Clifford O'Sullivan: Have we got that? Is that among your things—

Mr. Mahoney: (Interposing) Yes, your Honor.

Hon. Thomas P. Thornton: That is the one that came in yesterday?

Mr. Mahoney: No, your Honor. That was submitted several days ago.

Hon. Thomas P. Thornton: It takes quite a lot of research to keep them lined up here.

[fol. 213] Mr. Mahoney: It is the United States against the State of Idaho.

Hon. Clifford O'Sullivan: Is that among the papers we have in front of us?

Mr. Mahoney: Yes.

Hon. Clifford O'Sullivan: Mr. Mahoney, let me ask this, and I think it may clarify my thinking—I can't speak for the other members of the Court—but, isn't our job in this case to determine what Congress said or meant when it passed the statute?

Mr. Mahoney: Yes, your Honor.

Hon. Clifford O'Sullivan: And, while it may be interesting, do you think that the economic consequences of the enforcement of that statute should be controlling in trying to arrive at the meaning of the statute?

Mr. Mahoney: No, your Honor, I don't think that is necessary.

As I said in our brief, the only reason I referred to Mr. Crotty's testimony was to make the Court aware of the effect of these conditions, and the effects of job abolishment and transfer, which the Commission was well aware of and which all the parties were well aware of.

We all know what happens under these conditions; we all know what happens when jobs are abolished and transferred as a result of economic conditions, and so forth. [fol. 214] And the only reason it was put in the brief was merely to acquaint the Court with those facts.

Hon. Clifford O'Sullivan: Wasn't that the purpose of urging to Judge Thornton the importance and great necessity of a restraining order?

Mr. Mahoney: Oh, yes.

Hon. Clifford O'Sullivan: And does it add anything to the merits of your contention as to what the statute says or means?

Mr. Mahoney: No, sir, it does not. Except, as I say, for our other request here for the temporary injunction and permanent injunction, which we request be issued if the plaintiffs prevail, and I think to that extent it would support the issuance of such an injunction and would be necessary.

Hon. Thomas P. Thornton: Here is the way the matter appeals to me: At the time of the hearing on the application for temporary restraint I tried to impress upon everybody the fact that the determination was going to be made by the three-Judge Court. This three-Judge Court, as I see it, has not asked for any testimony to assist us in our

determination, and until that is done I don't think it is admissible, myself.

If we feel the need, as I understand it, of testimony to assist us in making a determination, why, then we could [fol. 215] call upon it. But this three-Judge Court hasn't done that.

Mr. Mahoney: As I say, the only point would be that if the plaintiffs were to prevail on the merits of this case, then it seems to me that the Court would have to rely on the testimony of Mr. Crotty in order to issue a temporary injunction or permanent injunction—I may be in error on that—but that is the purport of our request here.

Mr. Rohr: If the—

Hon. Clifford O'Sullivan: (Interposing) Excuse me just one moment. (Conferring privately with Judges Levin and Thornton.)

Well, speaking for myself—and I do not necessarily express the view of all the Court, although I think for the moment we are agreed upon how we should proceed—at least it impresses me that this matter before us should be decided, disposed of on the record before the Interstate Commerce Commission. We do have now whatever testimony was offered before Judge Thornton to support the application for restraint. We would like to proceed now with this hearing.

If it is the consensus of the members of this Court, after listening to arguments on both sides, that any of the evidence before Judge Thornton should be considered by us, in disposing of the matters that are going to be before us, [fol. 216] we will advise the respondents, and if they then wish to apply to us for the right to offer evidence to meet the factual contentions that are supported by the transcript before Judge Thornton, we will have to set a time for hearing.

Mr. Rohr: Thank you. Might I ask one more question?

The issue—and this is an effort to refine the issue before the Court—I am still unclear from the RLEA brief whether they are arguing that John Jones who was employed for three months, hired in before the merger, is entitled to a job freeze for four years thereafter?

Such argument was made before the Commission.

Throughout their brief there is a reference to a four-year period.

Could you enlighten us, Mr. Mahoney, as to whether—

Hon. Clifford O'Sullivan: (Interposing) Let me say this: why don't we hold that, and I think that will probably be taken care of by the argument.

Mr. Brand: May I ask your Honors a question?

Hon. Clifford O'Sullivan: Yes.

Mr. Brand: Is it understood we have the benefit of an offer of the transcript of Crotty's testimony? If not, we would like to offer the transcript.

[fol. 217] And I would like to say one more word about the admissibility of that, if you will permit me. In the brief we filed, a two-page brief, we cite this Idaho case, and may I read you two sentences of it?

(Reading):

"The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. * * * Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the Court did not err in admitting the additional testimony."

And this is the important part.

(Continuing reading):

"For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a Court—not to the final determination of either the federal or a state commission."

[fol. 218] Now, our point is that Mr. Crotty's testimony merely amplifies what is in the record before the Commission in many many places. We have prepared a memorandum pointing out the places where the things

that Mr. Crotty testified to are raised and exposed in the record.

The Supreme Court, in the case that I just read, referred to the fact that the District Judges in admitting that testimony held, and properly held, that what was being offered was merely an amplification of what was already in the record.

Hon. Clifford O'Sullivan: Mr. Brand, was that testimony before Judge Thornton offered for the purpose of amplifying and supplementing?

Mr. Brand: Yes.

Hon. Clifford O'Sullivan: Was it? Or was it offered solely for the application?

Mr. Brand: When it was taken?

Hon. Clifford O'Sullivan: Yes.

Mr. Brand: No, it was offered solely in connection with the hearing on the application for restraining order.

Hon. Clifford O'Sullivan: Then, what you are saying now, you would like to offer it to supplement the record made before the ICC.

Mr. Brand: That is right. It amplifies and illustrates. [fol. 219] Hon. Clifford O'Sullivan: Then are we going to review the hearing on this occasion?

Mr. Brand: No. That is all we intend to offer, is the transcript of the testimony of Crotty and the exhibits that were introduced in evidence, the contracts that Judge Thornton has.

Hon. Clifford O'Sullivan: To conclude the matter, let me make this suggestion: you have made the offer.

Mr. Brand: That is right.

Hon. Clifford O'Sullivan: At least tentatively we do not rule on it. We will consider it. This is something that is presented now for the first time.

Mr. Brand: Yes, sir.

Hon. Clifford O'Sullivan: If we conclude that it is proper for us to give any attention to the testimony offered before Judge Thornton, we will advise the respondents and give them, which I think would be only fair, the right to meet any part of that testimony by their evidence.

I fear it might lead, indeed, to a retrial of the whole thing, but that is the way we will leave it, if that is agreeable.

[fol. 220] Mr. Brand: Excepting that, your Honor, may we hand to the Court—not necessarily at this moment—the memorandum we have prepared supplementing the two pages we prepared referring to the Idaho case, in which we point out where in the record Mr. Crotty's testimony is amplifying and illustrative. We could serve those on counsel and hand them to the Court later.

Hon. Clifford O'Sullivan: You can file them.

(Documents were thereupon handed to the Court.)

Hon. Clifford O'Sullivan: I will say, even without getting around to the point of whether we are going to consider that, if you feel the presentation of this agenda calls for some reply by you, you may file a reply also within such time as we will determine after we have determined whether we will consider this question.

So, let us proceed, then.

Mr. Mahoney.

Mr. Mahoney: Thank you, your Honor.

I think perhaps I should take care of a preliminary matter. On Page 44 of my brief there is what I think is a vital typographical error. The word "not" should be "now." I say, "It would not seem to be clear," and I meant to say, "It would now seem to be clear."

Hon. Thomas P. Thornton: What is the page?

[fol. 221] Mr. Mahoney: Page 44, the fourth line from the top.

Hon. Clifford O'Sullivan: That is Page 44 in the second sentence of the first full paragraph; is that right?

Mr. Mahoney: Yes, sir.

Hon. Clifford O'Sullivan: "It would not seem to be clear" should be "It would now seem to be clear."

Mr. Mahoney: That is right, your Honor.

Hon. Clifford O'Sullivan: All right.

ARGUMENT BY MR. MAHONEY ON BEHALF OF PLAINTIFF

Mr. Mahoney: The Complaint in this case was filed by the Brotherhood of Maintenance of Way Employees and joined in by the Railway Labor Executives Association, which, incidentally, is an association composed of the chief executive officers of all the standard railroad labor unions of the United States, because the Interstate Commerce Commission had failed to obey the requirements of Section 5 (2) (f) when it approved the merger of the Erie and Delaware, Lackawanna & Western Company.

Section 5 (2) (f) requires the Interstate Commerce Commission, in approving transactions under Section 5 (2), which is the merger provision, to provide that no employee shall be placed in a worse position with respect to his employment for a period of four years following the merger unless—to answer Mr. Rohr—unless his employment with the railroad is less than four years, and then he is protected an equivalent time.

Hon. Clifford O'Sullivan: You made your position clear, that your contention is that those employees who have been with the railroad less than four years prior to the effective date shall have what you call their jobs frozen for not less than the period of time that they were employed prior to the effective date.

Is that your position?

Mr. Mahoney: Yes, your Honor. Perhaps it is semantics, but I really don't believe it can be called "job freeze." They do not freeze the jobs; they freeze the employment situation.

The jobs can be changed and employees may have to move. They may get other jobs. But they have to be comparable jobs at comparable wages. The jobs are not necessarily frozen.

That is our position.

[fol. 223] •

BEFORE THE INTERSTATE COMMERCE COMMISSION

Served March 30, 1960

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary, has been served.

FINANCE DOCKET No. 20707

ERIE RAILROAD COMPANY—MERGER, ETC.—DELAWARE,
LACKAWANNA & WESTERN RAILROAD COMPANY

Decided

1. Motion of the dissenting stockholders to reconvene the hearing to permit conclusion of cross examination and presentation of evidence if desired, overruled.
2. (a) Merger of the properties and franchises of The Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company for ownership, management, and operation, (b) acquisition by the latter of sole or joint control through ownership of stock of railroad carriers subsidiary to or affiliated with the former, and (c) acquisition of trackage

rights by the Erie Railroad Company, as successor in interest, over the line of the Pennsylvania Railroad now jointly used by The Delaware, Lackawanna and Western Railroad Company, approved and authorized, subject to conditions.

3. Authority granted to Erie Railroad Company to issue certain shares of Erie-Lackawanna Railroad Company common stock without par value in conversion of outstanding capital stock of the Erie Railroad Company and The Delaware, Lackawanna and Western Railroad Company, including certain restricted stock options of the latter; and to assume obligations and liabilities of The Delaware, Lackawanna and Western Railroad Company under its outstanding mortgage bonds and certain of its other securities; all in connection with the proposed merger, and subject to certain conditions.

[fol. 224]

REPORT AND ORDER RECOMMENDED BY HYMAN J. BLOND,
HEARING EXAMINER

[fol. 225]

EMPLOYEE CONSIDERATION

Estimated effect upon employees. The average number of the employees comprising the total staffs of the applicants, based upon counts made each month during 1956, 1957, and 1958, in order, are shown as follows:

	1956	1957	1958
Erie	18,134	17,245	15,021
Lackawanna	9,969	9,273	7,981

Consolidation of the applicant's work forces upon the merger becoming effective would entail a reduction in the total number of employees, and dislocation and rearrangement of the place of employment of many of the remaining employees. The seniority rosters of Erie and Lackawanna would be merged into single lists of employees headquartered at the various points involved. On the basis of the 1956 employment figures, available when study was pre-

pared, the unified company would have 28,103 employees at the time of merger. Estimated totals pertaining to the employment situation at the end of each of the first 5 years of unified operation, are shown as follows:

[fol. 226]

	Year After Merger					Total
	1st	2nd	3rd	4th	5th	
Total employees	27,689	26,854	26,533	26,157	26,069	
Jobs abolished	403	818	484	190	87	1,982
Re-employable locally	189	384	227	89	41	930
Jobs transferred	430	958	481	191	99	2,159
Deprived of employment	172	383	192	76	40	863
Created by attrition	2,507	2,440	2,402	2,387	2,380	12,116
Attrition jobs unused	2,318	2,056	2,175	2,298	2,339	11,186

Divided according to the general class of employees in groups as reported to this Commission, the 1,982 job abolishments would affect totals of, executive 76, clerical 636, maintenance of ways and structures 184, maintenance of equipment and stores departments 396, miscellaneous transportation 245, transportation yard employees other than yard crews 29, yard crews—engineers 51, firemen 51, conductors 51, brakemen 101, and train crews—engineers 31, firemen 31, conductors 27, brakemen 70, and 3 extra-board men.

The probable cost of affording job protection rights to the employees who would be affected adversely as a direct result of the merger, reflected in the Wyer report shows increased annual costs of \$505,133 chargeable to wages and rules adjustments necessary to equalize those which differ as to Erie and Lackawanna employees, and \$74,597 chargeable to non-recurring payments equivalent to 5 percent interest on the cost of payments to the affected employees; plus additional cash requirement of \$3,108,187 chargeable to operating expenses with accompanying Federal income tax benefits of 52 percent, making total net cash required, \$1,491,930. Study XIV, which supports the foregoing estimates assumes that approval of the merger would be made subject to the same conditions as those prescribed in *New Orleans Passenger Terminal Case*, 282 I.C.C. 271, (New Orleans case) which the applicants contend should be imposed in the proceeding herein. The cited case provides for application of the terms of the so-called Washington Job

Protection Agreement of May 21, 1936, subject to limitations defined in certain of the conditions included in *Oklahoma Ry. Co. Trustees, Abandonment*, 257 I.C.C. 177.

Employment records of the applicants for 1954, 1955, and 1956 were analyzed to determine the normal annual attrition due to deaths, retirements, dismissals, and resignations. Because most resignations involve junior employees, the applicants estimate that only between 40 percent and 60 percent of the jobs created by attrition within the 5 maintenance and transportation employee groups, and 80 percent of the professional, clerical, and general groups of jobs would be available for filling by employees whose jobs would be abolished; that all the executive and officials positions would be so available; that displaced employees at locations where substantial forces were located would [fol. 227] be re-employed locally; and that other displaced employees would be offered transfers to locations where jobs created by attrition would be available. Components of the total costs and net cash requirements shown include the expected costs to the unified company to provide displacement allowances for persons placed in a worse position; coordination allowances for persons deprived of employment; separation allowances payable in lump-sum settlements; moving allowances payable to affected employees who accept employment at other locations; and allowances for losses incurred by employees obliged to sell their homes and move to other locations. Wyer and the applicants assert that the interpretations of the protective conditions were applied to achieve a conservative result and that if there are discrepancies, they reflect overstatements of what the cost would be to the unified company.

Requests for additional labor protective conditions. An officer of the Railroad Marine Union requested the imposition of conditions to assure severance payments and job protection to the affected employees. The railway Labor Executive's Association opposes the merger as not consistent with the public interest in view of the predicated adverse effect upon more than 4,000 employees of the applicants, and the disadvantages alleged by the other interveners.

The labor association's brief is devoted to arguing that section 5(2)(f)¹⁰ of the act requires the prescribing of labor protective conditions adequate to assure the "employment" of all adversely affected employees for a minimum of 4 years after the effective date of the merger, rather than the providing of "compensation" in lieu of the employment. Accepting statements of proponents of the merger which indicate that the proceeding herein will prove to be a landmark in the field of railroad development which other railroads contemplating future mergers would accept and follow as a pattern, the labor association contends that since [fol. 228] enactment of the aforesaid labor provision as part of the 1940 amendment to the Interstate Commerce Act, the instant proceeding is the first major case of precisely the type of merger transaction which the Congress intended to regulate. Therefore it asserts that extreme care should be taken to insure complete compliance with the mandate of section 5(2)(f), in the event the merger proposed herein is approved by the Commission. It asserts that the issue was not determined in the recent approval of the merger of the Norfolk & Western Railway Company and the Virginian Railway Company inasmuch as the railroads and representatives of the employees had reached an

¹⁰ Section 5(2)(f). As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. *In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.* (Emphasis supplied.)

agreement which satisfied the requirements of section 5(2)(f).

Supporting the argument that the second section of the aforesaid law is explicit in requiring that the employment status of every employee be preserved for a period of 4 years after the date of the Commission's order of approval, the labor association cites the decision of the Supreme Court in *Railway Labor Executive's Association v. United States*, 339 U. S. 142 (rehearing denied), in which it considered the effective period for the application of labor protection prescribed by the Commission in its initial decision in the New Orleans case, 267 I.C.C. 763. The legislative history of section 5(2)(f) considerations before the House of Representatives and the Senate and their respective committees and conference committees, is outlined in detail to demonstrate that the employees must not be adversely affected for a minimum of 4 years. As the Commission's decision on further hearing of the New Orleans case, following the Supreme Court decision, gives full cognizance to the intent of the enactment pertaining to the minimum period of protection, further discussion herein on that point is not necessary. The other proposition allegedly intended in the second sentence of subparagraph (f), is that the protection envisions an indefinite "employee freeze" by which savings were to be realized through normal attrition. Thereupon, the conclusion is presented that appropriate fair and equitable minimum protection would provide not less than 4-year preservation of employment to every employee of every carrier affected by approval of transactions pursuant to section 5(2) of the act.

The labor association deems the proceeding herein as the ideal one in which to provide protection in the form of preservation of employment without relation to any other protection by way of compensatory benefits, because the applicants estimate that during the first 5 years after merger when employees would be affected, normal attrition would create openings for 600 percent more employees than would be affected by job abolishments; and that appropriate safeguarding of the affected employees of the applicants would probably involve a smaller financial burden than the payments estimated in Study XVI, under the provisions

of the New Orleans conditions. Included with the labor association's brief are conditions which it suggests should be imposed for a period of not less than 4 years, in the form (except for changes in the railroads' names) introduced [fol. 229] in evidence in the Norfolk & Western merger proceeding, to which the Commission referred in approving the application therein. Those conditions are reproduced and attached hereto as appendix "F".

Employee protective conditions the same as those prescribed in *New Orleans Passenger Terminal Case, supra*, would fully comply with the statutory standards requiring fair and equitable arrangements to protect the interests of railroad employees affected. Nothing contained in the arguments of the labor association disproves the adequacy of such conditions in terms of employment or compensation, which are without significance if not coupled together. It is not necessary to find that the conditions stipulated in the Norfolk & Western merger case would be fair and equitable, although nothing herein prohibits the applicants and the employee organizations from agreeing upon the provisions of those conditions. Nor should there be any presumption that if the parties had willingly agreed to the Norfolk & Western conditions, such would be found fair and equitable for purposes of being imposed as conditions in view of the circumstances pertaining to the proposed merger. See *Florida East Coast Ry. Co. Reorganization*, 307 I.C.C. 5. The New Orleans conditions will be included in the certificate and order recommended herein.

[fol. 229a]

APPENDIX "F" TO REPORT

F. D. No. 20707

Suggested Employee Protective Conditions

A fair and equitable arrangement for the protection of the interests of the employees adversely affected herein and one which will not result in employees of the Erie Railroad Company and the Delaware Lackawanna and Western Railroad Company being placed in a worse position with respect to their employment for a period of four years, will

be provided by applying the same conditions imposed in the *New Orleans Union Passenger Terminal* case, F. D. No. 15920 (New Orleans Conditions), for the protection of all employees of both the Erie and the Lackawanna who may be adversely affected with respect to their rates of pay, rules, or working conditions, or rights or privileges pertaining thereto, upon approval and effectuation of the proposed merger and related transactions, and in addition thereto the following:

(a) On the effective date of the proposed merger, the Erie-Lackawanna will take into its employment all employees of the Erie Railroad Company and the Delaware Lackawanna and Western Railroad Company who are willing to accept such employment, and none of the present employees of either of said carriers shall be deprived of employment or placed in a worse position with respect to their employment or compensation due therefor for a period of four years from this Commission's order of approval herein, because of the merger of the said railroads or any program of economies undertaken as a result thereof;

(b) Section 13 of the Washington Agreement and Condition No. 8 of the "Oklahoma Conditions" as found in the "New Orleans Conditions" shall not be applicable and the following provision shall apply:

"In the event any dispute or controversy arises with respect to the protection afforded by these conditions or by the New Orleans Conditions (Except as defined in Section 11 of the Washington Agreement and Condition 9(d) of the Oklahoma Conditions) or in connection with any agreement entered into between the carrier parties hereto and the representatives of their employees relating to the said merger and related transactions, as provided by the New Orleans Conditions, including an interpretation, application, or enforcement of any of the provisions of said agreements, which cannot be settled by the carrier or carriers and the employee or his authorized representative within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for considera-

tion and determination. Upon notice in writing served by one party on the other of intent by that party to refer the disputed controversy to an arbitration committee, each party shall within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to [fol. 229b] agree upon the appointment of the third member within 10 days, either party may request the National Mediation Board to appoint the third member. The decision of the majority of the arbitration committee shall be final and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them."

If should be the intent and effect of the foregoing conditions that all employees adversely affected by the merger prior to a date four years from the effective date of the order of approval are to receive as a minimum the protection afforded by the second sentence of Section 5(2)(f), namely, complete preservation of employment for four years, but if the total amount received by affected employees who are benefited by that sentence is less than they would have received under the New Orleans Conditions, applied from the date of adverse effect to them, then they are entitled to the remaining benefits which they would have received under the latter. Should the amount of compensation which an employee receives by virtue of the protection afforded under the second sentence of Section 5(2)(f), equal or exceed the amount to which he would have been entitled to under the New Orleans Conditions, then he shall receive nothing under the latter.

[fol. 230]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Transcript of Argument in Finance Docket No. 20707

ARGUMENT OF WILLIAM G. MAHONEY

Mr. Mahoney: Thank you, Mr. Chairman.

May it please the Commission, my name is William G. Mahoney, and I represent the Railway Labor Executives Association in this proceeding.

I have asked that an outline of the argument which I am going to attempt to present here be distributed because of its length and the limited time that I have. I couldn't possibly cover the—I couldn't possibly describe this issue as it deserves and also rebut the other side in 30 minutes, so I have taken the liberty of asking that this be distributed, [fol. 231] together with the brief which I prepared and submitted to the Examiner, and which was attached to my Exceptions as Exhibit A, because the outline refers to the brief page references.

This issue which is raised in this proceeding for the first time is the most important issue which this Commission has decided involving railroad employees in at least ten years.

The reason it is raised at this time is because of the onslaught, literal onslaught of merger cases, giant merger cases, which, if approved, will cut railroad employment in the United States by perhaps more than 25 per cent.

It was never raised before because there has never been a serious threat to over-all railroad employment since the passage of the 1940 Transportation Act.

The issue which is presented to the Commission in this proceeding is a very simple issue. It involves the second sentence of Section 5(2)(f). The issue is whether that sentence means what it very plainly says.

The second sentence of Section 5(2)(f) is set forth on page 1 of the outline, and the key clause in that second sentence is underlined and says, "will not result in employees . . . being in a worse position with respect to their employment." The key word in that clause is "employment". And we are here to determine what did Congress mean when it said "employment". Did it really mean "employment" as

everyone understands it, or did it mean something else? [fol. 232] Did it mean "compensation", "compensation in lieu of employment"?

It is the contention of the Railway Labor Executives Association, speaking for the hundreds of thousands of railroad employees who were intended to be protected by this very carefully and deliberately worded legislation and whose livelihoods are now jeopardized by this tidal wave of gigantic railroad mergers that this word in this clause of this sentence means exactly what it says, it means "employment."

Now, if it were applied as meaning "employment" literally, as it says, would that create any greater burden on the railroads, on these railroads particularly in this case, than the compensatory conditions?

We say it wouldn't. I say, as a matter of fact, that Mr. Cummings just admitted that it wouldn't. He said that the only employees who would be deprived of employment as a result of this merger would be those who refused to transfer, and that I took the position in a conversation with him just prior to the argument, that men who were compelled to transfer but who were not placed in a worse position with regard to their employment as a result of that transfer, would be considered protected under employment protection.

So if the only people are those, the only people who are protected here, to be considered as deprived of employment are those who refuse to transfer, and under an employment protective condition they would have to transfer, then the [fol. 233] railroad couldn't be hurt at all by the imposition of this. As a matter of fact, when they might well be helped.

The turnover in this employment, as is clear from the exhibits, especially Exhibit H-48 of the Applicants, shows that the turnover will be 600 per cent more than the number of jobs abolished. It will be 600 per cent more, over 12,000 jobs created by attrition as compared with almost 2,000 abolished in the period of five years following the merger.

Now, there may still be a few employees, very few—there doesn't appear to be from what Mr. Cumings says—but there may be a few employees carried, so to speak, for a short while. But it certainly couldn't be many in view of this tremendous turnover.

Furthermore, under the compensatory benefits, junior employees—the effect takes place from the bottom of the seniority roster—junior employees are laid off and are paid four years' protection. Under employment benefits, no one is laid off and the protection takes place from the top, and as the man dies, retires, resigns, or what happens, no protection is paid to the employee, it ceases.

So in very many cases it will cease in the first year or the second year, and this employment protection may well cost the applicant less than the compensation protection.

Now, to get to the statute itself, Section 5(2)(f). There are, of course, three ways of determining just what this [fol. 234] statute requires. We all agree, I think, that it does require something. It commands this Commission to do something in approving a merger. We can determine this in the language of the provision, from its legislative history, and from interpretation of that statute.

Now, with regard to interpretation, I would like to say this at the outset. The Interstate Commerce Commission has never considered this statute against the background of this issue, and, therefore, has never determined that this provision requires only compensatory benefits.

The language of the provision itself, with which we are concerned, is the first two sentences, the first one which requires a fair and equitable arrangement for employees, and the second, which requires that no employee shall be placed in a worse position with respect to his employment for four years from the date of the merger, or, depending upon his length of service, whichever is less.

This is the controlling provision, and what does it mean? Does it mean only compensation without performance of service therefor, or does it mean something else?

On page 3 of the outline there are cited a number of Supreme Court decisions involving fundamental rules and statutory construction on this point. I would like to read just one. It is from the United States against the First National Bank: "The natural and usual signification of [fol. 235] plain terms is to be adopted as the legislative meaning in a statute in the absence of clear showing that something else was meant."

And what is the clear showing that something else was meant?

There is none.

"Employment" means compensation and service. It has to. If someone is employed he isn't just paid, he works.

Now, if the Congress—perhaps the Congress, you might say, didn't know how to use a proper term in this context, but I say that they did because they were very familiar with the terms of the Washington agreement during consideration of this provision. It was analyzed, it was discussed, it was bisected and dissected, and it was gone over and over and up and down. And the terms of the Washington condition could have been used to very easily and irrefutably provide only worse position with respect to compensation, because Section 6 of that agreement says no employee shall be placed in a worse position with respect to compensation.

But Congress chose "employment."

[fol. 236] I agree that in a case last year, two months ago, that if this issue wasn't raised that we can't now go back. It was waived for the purpose of a particular case. But once this issue is raised, then it is, it must be decided. It has not been waived.

Commr. Walrath: Mr. Mahoney, that is the point that I was hoping you might cover, whether or not your concern is that the effect of, you might say, the normal conditions that we have been imposing on this particular merger or whether it is for the future, in mergers that you anticipate.

With this ratio of attrition, it would seem on the face of things that there will be no actual loss of jobs.

Now, is that not true?

Mr. Mahoney: No. The Applicants feel, in their conjecture and their guesstimate as to what this will do, that no employees will be deprived of their jobs if they will transfer, but 863 of them, they guess, will not transfer, they will be deprived of their jobs. Under an employment protective setup, I say that they wouldn't, they would have to transfer if the jobs were jobs of the same type and the conditions were the same or comparable conditions, and the pay was the same. Then I think they would have to transfer.

So that there would be, in this case, no reason at all for [fol. 237] these employment benefits to cost the railroad certainly any more than the compensatory benefits.

Commr. Walrath: On the face of things, it looks like this would work without injury either to the brotherhoods or to the carriers—

Mr. Mahoney: That's right.

Commr. Walrath: —if we should approve that basis.

Mr. Mahoney: And it would have a tremendous effect on the employment in the railroad industry because they would know that, regardless of these things happening, they weren't going to lop off a lot of jobs at the bottom, these fellows would all be bumped out, but this is going to take place a little more gradually. In many cases, like in this, it is going to take place very fast because the attrition rate is so fast.

Commr. Walrath: Now that I have interrupted you, let me ask for information, isn't it customary in the industry that the railroads would prefer to hire the experienced people and not get rid of somebody and go out and get somebody who knew nothing about it?

Mr. Mahoney: I would think so, yes.

Commr. Walrath: So that there is a mutuality of interest there, I would say, on the face of it.

Mr. Mahoney: I would say yes. As I say, it seems to us it would be to the benefit of both in a situation, certainly a situation like this. And we feel that this is actually what [fol. 238] is required, and we are bringing it now to issue because of the tremendous cut that will come in employment through these major mergers.

Now, this is not, as is claimed by the other side, a violation of the national transportation policy, because 5(2)(f) is written into the national transportation policy. The national transportation policy, as it now exists, was passed along with the Transportation Act of 1940, and 5(2)(f) was a part of that. And, as a matter of fact, the policy states that one of its ends is the establishment of equitable working conditions and an economical arrangement for transportation.

Now, they cite the Great Northern Railway Company Discontinuance case, where it says you cannot keep jobs for employees who aren't needed, and so forth. Well, that case is inapposite here since it involved an abandonment of service, and if you will look on page 5 of this outline, you will see that abandonment of service was expressly ex-

cluded by the Congress from preservation of employment—the preservation of employment provisions that are found in 5(2)(f).

In conclusion, we respectfully submit that the plain language of Section 5(2)(f), its unequivocally and unusually clear legislative history, and its interpretation by the United States Supreme Court require the Commission to preserve the employment of all employees who would be [fol. 239] affected by a transaction under Section 5(2) for a period of at least four years from the date of the Commission's order of approval.

[fol. 240]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

OPINION—December 7, 1960

Before: O'SULLIVAN, Circuit Judge, LEVIN, Chief District Judge, and THORNTON, District Judge.

THORNTON, District Judge: A statutory three-judge court was convened pursuant to 28 U.S.C.A. §§1336, 1398, 2284

and 2321-25, to hear and determine the issue presented by the complaint here filed. This Court is asked to enjoin and set aside an order of the Interstate Commerce Commission (hereinafter also referred to as either the Commission or the ICC), dated September 13, 1960 and effective October 17, 1960, approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company. The argument upon which the relief sought is premised is single in its thrust. The issue for determination is a narrow one. The order of the Commission which is being attacked contains certain provisions pursuant to 49 U.S.C.A. §5(2)(f) of the Interstate Commerce Act (also known as the Transportation Act of 1940). It is with the interpretation of 49 U.S.C.A. 5(2)(f), hereinafter referred to as 5(2)(f) that we are concerned. We here quote 5(2)(f), [fol. 241] underlining the words which are the crux of this controversy:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The sole question presented is whether this provision requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time to his service with the railroad carrier, not to exceed four years. The Commissioner, in its order of September 13, 1960, prescribed the so-called "New Orleans Conditions" which grant employees compensatory protection in the event of displacement or discharge.

We should perhaps here state that the merger has in fact gone ahead as per the effective date of the order with the exception of those terms which were imposed to comply with the provisions of 5(2)(f). The status of the employees of the merging railroads has not been disturbed pending [fol. 242] this Court's decision. Such procedure was agreed upon by the respective parties at the time of the hearing on the motion for a temporary restraining order which was noticed for hearing, and held, shortly prior to the effective date of the Commission's order. The merged railroad, now the Erie-Lackawanna Railroad Company, has since become an intervening defendant by virtue of substitution for the two railroads.

To aid us in arriving at a proper conclusion the parties have submitted briefs, copies of reports relative to the proposed merger, copies of Congressional Committee reports and of pertinent sections of Congressional debates, copies of agreements (to protect employees) heretofore incorporated in prior railroad merger or combination proceedings, and copies of the proceedings before the Commission. The "New Orleans Conditions", above referred to and contained in the order of the Commission approving the merger, were compensatory protective conditions which were prescribed in ICC orders entered in railroad merger proceedings involving parties different from those here, such proceedings having taken place in New Orleans. The "New Orleans Conditions" do not embrace continued employment. We do not deem it important to our decision that these conditions be set forth here. It is plaintiffs' contention that *anything* short of actual continued employment is violative of the language and intendment of 5(2)(f) with

respect to the phrase therein "being in a worse position with respect to their employment." Section 5(2)(f) requires protective conditions which are to be continued for a period of four years¹ for employees of the merging carriers. This is agreed. But the interpretation of the extent [fol. 243] of such benefits and of the mandate of 5(2)(f) is presented to us in two sharply contrasting outlines.

We believe it to be without dispute that this is the first instance since the 1940 enactment of 5(2)(f) that there has been an attempt to get judicial (or ICC, for that matter) recognition of the construction now placed by plaintiffs on 5(2)(f). In no case that has been called to the Court's attention has the construction urged by plaintiffs been placed on this Section. In no case has the proposition advanced here been previously advanced. In the numerous cases that have come before the ICC where 5(2)(f) conditions were required to be met, they were considered to have been met by various compensatory plans, continued employment not being one of them. From our reading of 5(2)(f) we are unable to find a clear expression, as plaintiffs contend, that continued employment of affected employees is required to be imposed. We believe that ordinary every-day logical reading of 5(2)(f) mitigates against plaintiffs' contention. The phrase here in issue, "in a worse position with respect to their employment" is couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition, much less that of guaranteed employment. It would appear to have been a simple matter to have incorporated the concept of continued employment in this sentence, had such been the intention of Congress. The plaintiffs' contention that the language "in a worse position with respect to their employment", being broader in scope than language granting "compensation", is that employees are required to be retained in an employment status following a merger. We do not agree that this language should be so construed. Congress could have used language clearly stating that the railroads may not discharge affected employees. Congress did precisely that in [fol. 244] the Emergency Railroad Transportation Act of

¹ This is modified with respect to employees in the service of the railroad less than four years.

1933, 48 Stat. 211, and the Communications Act of 1943, 47 U.S.C.A. 222(f). It is our observation, therefore, that insofar as the plain language of 5(2)(f) is concerned, a literal approach giving effect to each phrase therein, necessitates denying the construction contended for by plaintiffs. This is to say that we do not consider that there is ambiguity within the structure of 5(2)(f). Under ordinary rules of statutory construction we would be precluded from pursuing any further line of inquiry. However, both parties to this cause claim support for their respective contentions in the legislative and operational history of the Act. We therefore review such history.

First, as the Act was originally proposed and adopted, it did not contain the specific language which is before us. As then proposed it clearly would not have called for job security or "job freeze" as a condition to authorizing a merger of railroads. It is clear also that Representative Harrington of Iowa sought to have an amendment adopted to the proposed Act which would provide that no employee should be displaced or his job impaired by a railroad merger. It appears that, as originally proposed, the so-called "Harrington Amendment" would have required such conditions to be imposed. From the offering of this amendment until the Act was finally adopted, the issue of whether or not "job freeze" should be a condition of any merger, was clearly and distinctly before the members of Congress. Whether such condition should be followed was discussed, pro and con, during the time this legislation was considered. The Harrington Amendment as originally proposed provided:

"No such transaction shall be approved by the Commission if such transaction shall result in *unemployment or displacement of employees of the carrier or carriers*, or in the impairment of existing employment [fol. 245] rights of said employees." ² (Emphasis supplied.)

Such amendment was not adopted into law, nor does the Act as it exists contain any language which might be said

² 84 Cong. Rec. 9882 (1939).

to be equivalent to what Mr. Harrington proposed. It is clear that the members of Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent.

Second, at the time of, and following, the enactment of the Section now before us, representatives of the plaintiffs in this cause gave public expression to, and understanding of, what was accomplished by the Section before us, and clearly asserted that it was their understanding that protection was to be afforded by way of compensation to such employees as would lose their jobs or be displaced as a consequence of a merger.³

Third, the application and construction of the Section have been before the ICC in many cases during the twenty years since the enactment of the Transportation Act of 1940. Consistently and clearly, the ICC has interpreted the particular language in the same manner as it now contends it should be construed. It is true that the issue now made by plaintiffs in this case was not presented to, nor passed upon, by the ICC in any of the cases adjudicated in the preceding twenty years. Neither, however, did these plaintiffs, as representatives of the employees involved, there make the contention that is being made in the instant proceeding. The ICC in its 1941 report referred to 5(2)(f) [fol. 246] as granting only compensatory benefits. Such a contemporaneous administrative construction of a statute is entitled to great weight and indeed the Commission has never deviated from that interpretation. The plaintiffs contend that they have never challenged the Commission's interpretation because only in recent years have wholesale mergers occurred in the railroad industry with the resultant effect of a reduction in employment opportunities. How-

³ See *Brotherhood of Maintenance of Way Employees' Journal*, volume XLIX, pages 13 and 14 (October 1940); *The Railway Conductor*, volume 57, page 308 (October 1940); *Locomotive Engineers' Journal*, page 725 (October 1940); *Brotherhood of Locomotive Firemen and Enginemen's Magazine*, page 223 (October 1940); *Railway Clerk, Official Journal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, pages 467 and 488.

ever, in at least one prior large-scale merger compensatory relief was afforded employees.⁴

Fourth, it is clear also that since 1940 the United States Congress has been aware of the construction placed upon the Act by those interested in its interpretation and enforcement. It has not seen fit to indicate by any attempted clarification of the Act its disagreement with the construction uniformly placed upon it in the intervening years.

Two decisions of the Supreme Court which have been cited and argued by all parties to this controversy in support of their respective positions should be mentioned. This Court, however, deems both decisions inapposite to the issue here. In *Railway Executives Association v. United States*, 339 U.S. 142 (1950), the Supreme Court held that the four-year limitation in 5(2)(f) provided only a minimum period of protection for employees and that the first sentence of 5(2)(f) still required the Commission to arrange a fair and equitable solution and protect the interests of the railroad employees. In *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1960), the sole question was whether a strike arising out of the [fol. 247] railroad carriers' refusal to negotiate an agreement with a union that would prevent the railroad from abolishing any position was a "labor dispute" within the meaning of the Norris-LaGuardia Act. It is interesting to note that in this decision Mr. Justice Whittaker, writing for the four dissenting justices, specifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to "freeze existing jobs". The majority opinion, however, never reached this question.

One additional observation may be in order. The decision of this Court that 5(2)(f) provides only compensatory benefits is supported by the general policy of the ICC which is to promote "safe, adequate, and efficient service and foster sound economic conditions in transportation." A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy partially through the reduction of per-

⁴The Louisville and Nashville Railroad Company Merger, 295 ICC 457 (1957), affirmed *City of Nashville, Tennessee v. United States*, 155 F.Supp. 98 (M.D. Tenn. 1957) affirmed 355 U.S. 63 (1957).

sonnel. It seems to us that if Congress had intended such a result it could have, and would have, said so in unequivocal language.

The temporary restraining order will be set aside and the complaint dismissed. An order in accordance with the foregoing may be presented.

Clifford O'Sullivan, Circuit Judge, Theodore Levin,
Chief Judge, United States District Court, Thomas
P. Thornton, United States District Judge.

Dated at Detroit, Michigan; this 7 day of December, 1960.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 248] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff,

—and—

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants,

—and—

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

ORDER

At a session of said Court held in the Federal Building, City of Detroit, Wayne County, Michigan, on the 19th day of December, 1960.

ORDER DENYING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF, DISMISSING COMPLAINT AND SETTING ASIDE TEMPORARY RESTRAINING ORDER—December 19, 1960

This cause having been briefed and argued on the merits by counsel for the respective parties and having been fully submitted at the close of hearing on November 15, 1960, and

—This Court, after due consideration, having rendered its decision and stated the grounds therefor in its Opinion dated and filed December 7, 1960,

Now, Therefore, in conformity with said Opinion,

It Is Hereby Ordered That:

1. Plaintiffs' request for injunctive relief be and here-
[fol. 249] by is denied and the above-entitled action and the Complaint therein be and they hereby are dismissed with prejudice to Plaintiffs.

2. The temporary restraining order entered October 14, 1960 be and hereby is set aside and rendered null, void and of no effect.

Clifford O'Sullivan, Circuit Judge.

Theodore Levin, Chief Judge, United States District Court.

Thomas P. Thornton, United States District Judge.

[fol. 250]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES and
RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor,
Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, and ERIE-LACKAWANNA RAILROAD
COMPANY, Intervenor, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed January 9, 1961

I

Notice is hereby given that the Brotherhood of Maintenance of Way Employees, plaintiff, and the Railway Labor Executives' Association, intervenor-plaintiff, in the above-entitled action, hereby appeal to the Supreme Court of the United States from the final order dated and entered in this action on December 19, 1960, dismissing the complaint and action.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. The complaint and appendices thereto filed in the above-entitled action on October 7, 1960, to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission.

2. The motion for order authorizing intervention filed herein by the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company on October 10, 1960.

[fol. 251] 3. The order authorizing intervention of the Erie and DL&W entered on October 10, 1960, by consent.

4. The answer and appendices of defendant railroads dated October 11, 1960.

5. The motion for order authorizing intervention filed by the Railway Labor Executives' Association on October 12, 1960.

6. The order authorizing intervention of the Railway Labor Executives' Association entered October 12, 1960.

7. The transcript of the hearing held before the United States District Court for the Eastern District of Michigan, Honorable Thomas P. Thornton, District Judge, on October 12, 1960, on the issuance of a temporary restraining order.

8. Plaintiffs' Exhibits Nos. 1 through 7 admitted into evidence at the hearing held before Honorable Thomas P. Thornton on October 12, 1960.

9. The motion for substitution and redesignation of intervening party defendants filed October 27, 1960.

10. The order authorizing substitution and redesignation of intervening party defendants entered October 27, 1960, by consent.

11. The amended answer of intervenor defendant Erie-Lackawanna Railroad Company filed October 31, 1960.

12. The joint answer of the defendants United States of America and Interstate Commerce Commission filed herein on November 1, 1960.

13. Stipulation of counsel, dated November 4, 1960, as to portions of Interstate Commerce Commission record to be brought before District Court and waiver of designation.

14. The following portions of the record before the Interstate Commerce Commission, brought before the District Court:

(a) the joint application of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad Company in Finance Docket No. 20707;

[fol. 252] (b) the returns to questionnaire filed by the Delaware, Lackawanna and Western Railroad Company and Erie Railroad Company in Finance Docket No. 20707;

(c) the petition of the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(d) the order permitting the Railway Labor Executives' Association to intervene in Finance Docket No. 20707;

(e) the direct testimony of William Wyer in Finance Docket No. 20707 with respect to the issue raised by the complaint herein, including his statement G and the cross-examination of William Wyer on behalf of Railway Labor Executives' Association, being pages 122-123, 611-635 of the Transcript, in Finance Docket No. 20707;

(f) Wyer's Exhibit H-48.

(g) oral argument in Finance Docket No. 20707 before the full Commission on behalf of the Railway Labor Executives' Association and on behalf of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company, with respect to the issue raised by the complaint herein, being pages 1731-1740, 1771-1792, 1792-1799, 1805-1806, of the Transcript;

(h) Examiner's Proposed Report in Finance Docket No. 20707 served March 30, 1960; and

(i) Report of the Commission and Certificate and Order, dated September 13, 1960, in Finance Docket No. 20707.

15. The transcript of the proceeding held before Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thomas P. Thornton, District Judge, on November 15, 1960.

16. The decision and opinion of the statutory three-judge court dated December 7, 1960.

17. The motion for order preserving the status quo pending appeal to the Supreme Court of the United States dated and filed in this proceeding on December 8, 1960.

[fol. 253] 18. The transcript of the proceeding held before Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thomas P. Thornton, District Judge, on December 19, 1960, on the motion for order preserving the status quo.

19. The order of the statutory three-judge court, denying the motion for order preserving the status quo dated and entered in this proceeding on December 19, 1960.

20. The order of the statutory three-judge court, dated and entered on December 19, 1960, denying a permanent injunction, dismissing the action and the complaint, and setting aside the temporary restraining order on October 14, 1960.

21. This notice of appeal.

III

The following questions are presented by this appeal:

1. Did the Interstate Commerce Commission in its order approving the merger of the Erie and the DL&W violate the requirements of Section 5(2)(f) of the Interstate Commerce Act [49 U.S.C. 5(2)(f)] which section requires a fair and equitable arrangement for the protection of employee interests and as a minimum basis of such arrangement specifies that no employees of railroad carriers affected thereby shall be placed "in a worse position with respect to their employment" for a period of up to four years from the effective date of the Commission's order, depending upon the length of the employees' service, when its order approved the said merger subject to an arrangement which provides partial financial compensation for employees *after* and on specific condition that their position with respect to their employment has been worsened?

2. Are not railroad employees placed in a worse position with respect to their employment by the Commission's approval order herein which contemplates that such employees will be deprived of their employment; that they

will be placed in lower paying less desirable positions; [fol. 254] that they will be forced to exercise their seniority rights and displace fellow junior employees and be displaced by fellow senior employees; that they will be forced to move their families to new places of employment, not once but an indefinite number of times during a five year period following Commission approval until all job abolishments and displacements as a result of the merger have taken place, notwithstanding the fact that such order grants partial financial compensation to such employees after these effects have occurred?

3. Did the Interstate Commerce Commission, and the United States District Court for the Eastern District of Michigan sitting as a statutory three-judge district court in upholding the Commission, misinterpret the plain language of Section 5(2)(f), ignore the intent and purpose of Congress in enacting that provision into law and fail to apply the clear interpretation of that provision as set forth by this Court in its decision in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 70 S.Ct. 530, 94 L. ed. 721, and *The Order of Railroad Telegraphers v. The Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.Ct. 761, 4 L. Ed. 2d 774?

4. Does not Section 5(2)(f) require that railroad mergers be approved only upon such terms and conditions as will continue the current employees in equivalent employment for the prescribed period and will permit the economies to be realized at the expense of employees to be achieved only as the current forces are reduced by natural attrition, i.e. as deaths, retirements, resignations, etc. occur?

5. Did not the statutory three-judge court err in refusing to consider the sworn testimony of plaintiffs' witness while accepting and relying upon excerpts from briefs and magazine articles, none of which were part of the record before the Commission or the court?

[fol. 255] George E. Brand, George E. Brand, Jr., William G. Mahoney, Attorneys for Brotherhood of Maintenance of Way Employees and Railway Labor Executives' Association.

[fol. 256] Proof of Service (omitted in printing).

[fol. 258]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and
RAILWAY LABOR EXECUTIVES' ASSOCIATION, Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COM-
MISSION and ERIE-LACKAWANNA RAILROAD COMPANY,
Defendants.

ORDER DENYING MOTION TO STRIKE ITEMS FROM
DESIGNATION OF RECORD ON APPEAL—January 23, 1961

At a session of said Court held in the Federal Building,
in the City of Detroit, Michigan, this 23rd day of January,
A.D. 1961.

Present Thomas P. Thornton, District Judge.

Upon hearing and consideration of the Motion to Strike
Items 7 and 8 from Plaintiffs' Designation of the Record
on Appeal and for Certification of the True Record hereto-
fore filed by defendants United States Of America and
Interstate Commerce Commission, and it appearing to the
Court that said motion should be denied,

It Is Hereby Ordered that the said motion is hereby
denied.

Thomas P. Thornton, District Judge.

Clerk's Certificate to foregoing paper omitted in print-
ing.

[fol. 264] Clerk's Certificates to foregoing transcript
omitted in printing.

[fol. 267]

SUPREME COURT OF THE UNITED STATES

No. 681, October Term, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
Appellants,

VS.

UNITED STATES, ET AL.

Appeal from the United States District Court
for the Eastern District of Michigan.

ORDER NOTING PROBABLE JURISDICTION—February 26, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the motions to advance are granted. The application for a stay of the decree of the three-judge district court insofar as it terminated a temporary restraining order previously granted presented to Mr. Justice Stewart, and by him referred to the Court is granted.

FILE COPY

No. 681

Office-Supreme Court, U.S.

FILED

JAN 27 1961

JAMES R. BR. WIND. CLK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff-Appellant
and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff-Appellant

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendant-Appellees

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant-Appellee

Appeal From the United States District Court for the
Eastern District of Michigan

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff-Appellant

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff-Appellant

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendant-Appellees

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant-Appellee

Appeal From the United States District Court for the
Eastern District of Michigan

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association, appellants, submit this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and order.

of the United States District Court for the Eastern District of Michigan, Southern Division, dated and entered on December 19, 1960.

OPINIONS BELOW

The opinion of the specially constituted District Court of three judges is reported at F. Supp. * The report of the Interstate Commerce Commission is found at 312 I.C.C. 185. A copy of the opinion of the District Court is attached hereto as Appendix A. A copy of the final order of the District Court is attached hereto as Appendix B.

BASIS OF JURISDICTION

I

This is an action brought by the Brotherhood of Maintenance of Way Employees, in which the Railway Labor Executives' Association intervened as plaintiff, to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2), approving the merger of the Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company, subject to certain conditions for the protection of employees purportedly imposed in accordance with the mandate of subparagraph (f) of section 5(2). The Commission held that said mandate requires only the imposition of conditions providing partial financial compensation to employees after, and on specific condition that, their position with respect to their employment has been worsened, notwithstanding the fact that subparagraph (f) states that the

* The opinion of the District Court is not officially reported as yet but was issued on December 7, 1960, in Civil Action No. 20,575.

Commission shall impose conditions which provide that for a period of up to four years (depending upon a particular employee's length of service) following the effective date of its order the transaction approved "will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment."

II

The final judgment and order of the United States District Court for the Eastern District of Michigan, Southern Division, was dated and entered on December 19, 1960. Notice of appeal was filed in said Court on January 9, 1961. An application for stay of the dissolution of a temporary restraining order, entered on October 14, 1960 preserving the employment status quo on the railroads involved, was denied by order of this Court on January 23, 1961 without prejudice to its renewal upon prompt docketing of this appeal.

III

The jurisdiction of this Court to review on appeal the final judgment and order of the District Court is conferred by 28 U.S.C. § 1253, 62 Stat. 926.

IV

The following decisions, among others, sustain the jurisdiction of this Court to review the final judgment and order of the District Court on direct appeal in this case:

Railway Labor Executives' Association v. United States, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721;

United States v. Lowden, 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208;

Interstate Commerce Commission v. Railway Labor Executives' Association, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904.

V

The statutory provision involved is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C. § 5(2)(f)), which provides as follows:

“(f). As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.”

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the Interstate Commerce Commission in its order approving the merger of the Erie and the DL&W violated the requirements of Section 5(2)(f) of the Interstate Commerce Act [49 U.S.C. 5(2)(f)] which section requires a fair and equitable arrangement for the protection of employee interests and as a minimum basis of such arrangement specifies that no employees of railroad carriers affected thereby shall be placed "in a worse position with respect to their employment" for a period of up to four years from the effective date of the Commission's order, depending upon the length of the employees' service, when its order approved the said merger subject to an arrangement which provides partial financial compensation for employees *after* and on specific condition that their position with respect to their employment has been worsened.

2. Whether railroad employees will be placed in a worse position with respect to their employment when, as a result of the Commission's order approving the Erie-DL&W merger, they will be deprived of their employment; placed in lower paying less desirable positions; forced to exercise their seniority rights and displace or deprive fellow junior employees of their jobs and be displaced or deprived of their jobs by fellow senior employees; forced to move their families to new places of employment, not once but an indefinite number of times during a five-year period following Commission approval until all job abolishments and displacements resulting from the merger have taken place, notwithstanding the fact that such order grants

partial financial compensation to such employees *after* these effects have occurred.

3. Whether the Interstate Commerce Commission, and the District Court in upholding the Commission, misinterpreted the plain language of Section 5(2)(f), ignored the intent and purpose of Congress in enacting that provision into law and failed to apply the clear interpretation of that provision as set forth by this Court in its decision in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721, and *The Order of Railroad Telegraphers v. The Chicago and North Western Railway Company*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774.

4. Whether Section 5(2)(f) requires that railroad mergers be approved only upon such terms and conditions as will continue the current employees in equivalent employment for the prescribed period and will permit the economies to be realized at the expense of employees to be achieved only as the current forces are reduced by natural attrition, i.e., as deaths, retirements, resignations, etc., occur.

5. Whether the statutory three-judge court erred in refusing to consider the sworn testimony of plaintiffs' witness while accepting and relying upon excerpts from briefs and magazine articles, none of which were part of the record before the Commission or the court.

STATEMENT OF THE CASE

This is an appeal from a final judgment and order of a specially constituted United States District Court of three judges which set aside a temporary restraining

order previously entered by that court with one judge sitting and dismissed the complaint to suspend, enjoin, annul and set aside an order of the Interstate Commerce Commission issued pursuant to Section 5(2) of the Interstate Commerce Act approving the merger of the Delaware, Lackawanna and Western Railroad Company into the Erie Railroad Company, subject to the application by the merged railroad carrier of certain employee protective conditions which provide partial financial compensation to employees who are deprived of employment, placed in lower paying jobs and required to move as a result of the merger.

A hearing was held on the joint application for merger before a Commission hearing examiner. At the hearing evidence was submitted by the railroad applicants regarding their intentions with respect to employees. The evidence indicated that the merger would require five years to consummate subsequent to Commission approval. During the first year following Commission approval the merged railroad planned to abolish 403 jobs and transfer another 430 jobs to points requiring the employees holding those jobs to move their homes; during the second year 818 jobs would be abolished and 958 jobs would be transferred; the third year would find 484 jobs abolished and 481 jobs transferred; the fourth year would see 190 jobs abolished and 191 jobs transferred; finally, during the fifth year 87 jobs would be abolished and 99 would be transferred. The total for the five-year period would be 1,982 jobs abolished and 2,159 jobs transferred.

In its brief to the hearing examiner, the Railway Labor Executives' Association, an intervenor representing through its members the employees of the Erie and the DL&W as well as virtually all railroad

employees in the United States, contended that subparagraph (f) of Section 5(2) must now be applied as it originally was intended to be applied and that subparagraph (f) meant what it plainly said in providing that as a result of a merger no employees will be placed "in a worse position with respect to their employment" for four years from the effective date of the Commission's order unless they had served less than four years in which event the protective period would equal the period of their previous service. The Association contended that for the prescribed period the Commission was required to condition the merger upon the railroad's providing comparable jobs at comparable pay with such savings as were to be realized at the expense of employees to be secured through natural attrition, that is as deaths, retirements, resignations, etc., occur. Such a method of securing the benefits of the merger could not work a hardship on the merged railroad since its evidence showed that while 4,141 jobs were being abolished and transferred, 12,116 would be created by attrition.

In support of its position, the Railway Labor Executives' Association relied upon the plain language of Section 5(2)(f), its legislative history and the interpretation placed upon Section 5(2)(f) by this Court during the course of its opinion in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721.

The hearing examiner recommended the approval of the merger and the rejection of the Association's position but he did not attempt to discuss that portion of this Court's opinion in *Railway Labor Executives' Association v. United States*, *supra*, relied upon by the Association. The examiner recommended the imposi-

tion of the so-called "New Orleans" conditions which were evolved subsequent to this Court's decision in *Railway Labor Executives' Association v. United States, supra*, and provide partial financial compensation to employees whose position with respect to their employment has been worsened. The "New Orleans" conditions, however, do not prevent the worsening of that position. For example, these conditions do not protect an employee from being deprived of employment by the abolishment of his job; they do not protect an employee from a loss of accumulated annuity rights under the Railroad Retirement Act in the event he is deprived of his employment; they do not protect an employee from continued moves which result from later job abolishments and transfers resulting from the merger; and, most important of all in the light of the continual shrinkage of its plant by the railroad industry, they do not protect him from being forever deprived of employment in the railroad industry, an industry in which he may have spent years developing skills which are not readily adaptable to work in other industries.

The Association filed exceptions to the employee protection recommendation of the examiner and asked to be heard by the appellate division of the Commission to which merger cases are referred, Division 4. On the motion of the Erie and the DL&W the Division 4 proceeding was eliminated and the matter was referred directly to the full Commission which heard oral argument.

The full Commission affirmed the Examiner's recommendations on September 13, 1960, and in doing so made no mention of those portions of this Court's decisions in *Railway Labor Executives' Association v.*

United States, supra, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774. The latter case was decided subsequent to the filing of the Association's brief to the examiner and was relied upon before the Commission as confirming by dictum this Court's interpretation of Section 5(2)(f) in the former case.

On October 7, 1960, ten days before the Commission's order was to become effective, the Brotherhood of Maintenance of Way Employees, a railway labor union the president of which is a member of the Association, instituted this action against the United States and the Interstate Commerce Commission by filing a complaint with the United States District Court for the Eastern District of Michigan. The complaint requested the issuance of a temporary restraining order pending a hearing on the merits by a statutory three-judge court. The Erie and the DL&W intervened as party-defendants on October 10, 1960.

After notice to all parties a hearing was held on October 12, 1960, before a single judge on the issuance of a temporary restraining order at which the Association intervened and all parties were given full opportunity to present evidence. The plaintiffs informed the court that they were not interested in obstructing the merger of the railroads but merely wished to maintain the employment situation in status quo until the protective conditions required by Section 5(2)(f) could be imposed for the protection of employees. The hearing consumed the entire day and the court issued a temporary restraining order on October 14, 1960, requiring the railroads to maintain the status quo.

regarding employment after they merged on October 17, 1960.

A hearing on the merits was held on November 15, 1960, before three judges at which no additional evidence was received, however, argument was held on the issue of the interpretation of Section 5(2)(f).

The District Court issued its decision on December 7, 1960, in which it called for the dismissal of the complaint and the dissolution of the temporary restraining order. *Again no mention was made* of those portions of the decisions of this Court in *Railway Labor Executives' Association v. United States, supra*, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company, supra*, relied upon by plaintiffs-appellants. The Court's decision also informed the parties that an order consistent with its decision might be presented.

On December 8, 1960, plaintiffs-appellants filed a motion to maintain the status quo pending appeal to this Court. An argument was held on December 19, 1960, before the three judges of the District Court (no additional evidence was received) and the court informed the parties that it would sign two orders, one dismissing the complaint and setting aside the temporary restraining order and another denying the motion to maintain the status quo pending appeal to this Court. These orders were signed and entered on December 19, 1960. Notice of appeal was filed on January 9, 1961.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is substantial. Although jurisdiction in this case is conferred as a

matter of right by statute it is significant that several of the important reasons which guide this Court in exercising its discretion to grant petitions for certiorari are present here and attest to the substantial nature of the question presented.

First, the District Court has decided an important question involving the construction of a federal statute enacted in the interests of the morale and welfare of all employees comprising the railroad labor force in the United States and in furtherance of the national transportation policy. The question has not been decided by this Court (although dictum contained in certain of its decisions indicate this Court's interpretation of the question) but the question should be decided by this Court, particularly in view of the railroad industry's sudden *en masse* utilization of the merger provisions of Section 5(2) resulting in a direct, immediate and serious threat to the labor force of that industry.

Second, the question has been determined by the District Court in a manner contradictory of the interpretation placed upon Section 5(2)(f) by this Court and contrary to the clearly expressed Congressional intent in providing the legislation embodied in that statute as well as the plain language of the provision itself.

Third, the District Court in supporting its decision has acted contrary to and in conflict with the applicable decisions of this Court governing the interpretation of statutes and their legislative history.

Each of the reasons for regarding the question as substantial will be briefly discussed hereunder:

A.

1. It is now well established by decisions of this Court and acts of Congress that the morale and welfare of the railroad industry's labor force is of importance to the United States. *United States v. Lowden*, 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208; *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904; *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721. It is also beyond question that Section 5(2)(f) was enacted in furtherance of the national transportation policy. That policy, the promotion of a sound and efficient national transportation system, was the same in 1933 when Congress enacted the Emergency Railroad Transportation Act of that year (48 Stat. 211) as it was in 1940 when it enacted Section 5(2)(f). The 1933 act admittedly contained prohibitions against the discharge of employees as a result of the utilization of its provisions and the 1940 act contains substantively the same provisions. The Congress added subparagraph (f) to Section 5(2) to protect the welfare and preserve the morale of railroad employees in the face of the enormous threat to employment in the railroad industry posed by the liberalization of the merger provisions of the Interstate Commerce Act accomplished by the enactment of Section 5(2).

In time of great financial peril to the railroad industry, the Congress enacted the 1933 Act with a provision to protect railroad employment. That provision was specifically enacted in furtherance of a national transportation policy which did not change between 1933 and the enactment of the 1940 Act.

2. The primary question now before this Court has not been specifically ruled upon by it but it should be

decided by this Court. The Congress enacted Section 5(2) to ease the way for the voluntary merger of railroads in this country. Quite naturally Congress expected immediate and extensive use to be made of that provision as the railroad industry had indicated such a provision was vital to its financial recovery. At the same time Congress was aware that the vast majority of savings accomplished through the merger of railroads is realized at the expense of the labor force and so it provided very specific protection for employees as a counter to the threat which it had presented to them. It was the same threat, but to a greater degree, that it had provided in the 1933 Act and it provided the same protection against that threat.

The railroad industry, however, for reasons best known to itself did not utilize the provisions of Section 5(2) to merge railroads although it did use the statute to consolidate individual facilities of particular railroads, secure trackage rights over each other's lines and the like. For these minor purposes the application of financially compensatory conditions was adequate and, in fact, was suggested to the Commission by the railroad brotherhoods. In 1957, a merger took place between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railroad Company but at that time there was no indication that the attitude of the industry toward mergers had changed and that merger alone certainly presented no threat to the railroad labor force in the United States, therefore, no objection was raised to the imposition of the "New Orleans" conditions.

The following year, however, the Interstate and Foreign Commerce Committee of the United States Senate stated in a report that the railroad industry had

not "been sufficiently interested in self-help in such matters as consolidations and mergers of railroads."

S. Rep. 1649, 85th Cong., 2nd Sess., p. 11 (1958). This statement and perhaps other unknown reasons precipitated a virtual tidal wave of mergers unprecedented in the history of this country.

The first of the mergers to be considered and approved by the Commission was that involving the Norfolk and Western Railroad Company and the Virginian Railway Company. Those railroads executed an agreement with the chief executive officers comprising the Railway Labor Executives' Association to protect the employment of all employees involved in the merger by having natural attrition control the abolishment of jobs therefore, there was no reason to raise in that case the issue here presented.

The Erie-DL&W case was the next merger to be considered by the Commission and as those railroads refused to consider the execution of the type of agreement signed by the Norfolk and Western and Virginian the issue was presented to the Commission for decision.

The United States and the Interstate Commerce Commission in their joint brief to the District Court pointed out that there are now in various stages of consideration seven additional mergers involving the Seaboard Air Line Railroad Company; the Atlantic Coast Line; the New York Central; Baltimore and Ohio; Chesapeake and Ohio; Chicago, Burlington and Quincy; Great Northern; Northern Pacific; Spokane, Portland and Seattle; Norfolk and Western; New York, Chicago and St. Louis (Nickel Plate); the Wabash; Southern; Central of Georgia; Atchison, Topeka and Santa Fe; Western Pacific; Southern Pacific; Milwaukee; and Rock Island.

In addition, the New York Central and Pennsylvania explored a possible merger of their roads; the Pennsylvania has indicated that it will attempt a merger with the Norfolk and Western after the latter railroad obtains through merger the Nickel Plate and the Wabash; and the Commission has recently approved one merger involving the Soo Line, Wisconsin Central and the Duluth, South Shore and Atlantic and a second involving the Chicago and North Western and the Minneapolis and St. Louis.

Little imagination is needed to picture the severe and extensive adverse effects that approval of such mergers will have on the morale and welfare of the railroad labor force unless the type of protection intended by Congress under Section 5(2)(f) is provided.

It has taken twenty years for the railroad industry to utilize the tremendous economic weapon which Congress placed in its hands in 1940, certainly the employees of that industry should not be prevented from utilizing at this time the shield which Congress provided against the wielding of that weapon.

B.

1. When plaintiffs-appellants presented their case to the District Court they relied upon an interpretation of Section 5(2)(f) set forth in this Court's opinion in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721. At no time did plaintiffs-appellants contend that this Court's decision in that case disposed of the issue presented here. On the contrary, they pointed out that that case involved the effect of the four-year provision in Section 5(2)(f) *after* that period of time had elapsed while the instant case involves the question of the type

of protection which must be applied *before* the period has expired.

In relying upon *Railway Labor Executives' Association v. United States*, *supra*, plaintiffs-appellants merely cited the fact that the so-called Harrington Amendment, which with some modification became the second sentence of Section 5(2)(f), as originally introduced would have required the Commission to condition mergers upon the continued employment of all employees at equivalent wages; that the Harrington Amendment as modified by the Wadsworth motion to recommit was unchanged in substance which is confirmed by all who supported its recommitment; and that this Court, in the *Railway Labor Executives' Association* case, *supra*, recognized the fact that the bill as reported out of the second joint conference amended the Harrington Amendment in only one respect, that is, the length of time during which it would be effective subsequent to Commission approval of a merger. (339 U.S. at 151-154.)

Plaintiffs-appellants also relied upon the opinion of this Court in *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774, decided subsequent to the filing of their brief to the Commission hearing examiners. Here again plaintiffs-appellants made no claim that this Court's decision in the *Telegraphers* case was dispositive of the present issue but looked to this Court's reliance upon Section 5(2)(f) as an example of Congressional policy protecting employment under the provisions of the Interstate Commerce Act. Plaintiffs-appellants also pointed out the recognition given by the dissenting opinion in the *Telegraphers* case to this Court's interpretation of Section

5(2)(f) in the *Railway Labor Executives' Association* case and the dissenting opinion's disagreement with that interpretation. The District Court, however, ignored the specific portions of those opinions which plaintiffs-appellants relied upon stating that it deemed the specific holding of this Court in each case to be "inapposite to the issue here." (Appendix A, p. 7a.) The District Court noted that the dissenting opinion in the *Telegraphers* case "specifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to 'freeze existing jobs.' The majority opinion, however, never reached this question." (Appendix A, p. 8a.)

2. The plaintiffs-appellants also relied upon the unusually clear legislative history of Section 5(2)(f). It was pointed out that the Harrington Amendment as originally worded prohibited discharge or displacement of employees as a result of mergers, and with this the District Court agreed (Appendix A, p. 5a); it was pointed out that the modified language of the Harrington Amendment as set forth in the Wadsworth motion to recommit did not change the substance of the original language and Representative Harrington himself confirmed this as did every member of the House who spoke in support of the motion. Representative Harrington expressed as follows the effect of the Wadsworth motion which contained the phrase "worse position with respect to employment":

"The motion to recommit, which will shortly be made by . . . [Mr. Wadsworth], will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, *with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment* . . .

"The labor protective provision, which so many of us favor, is beneficial to all railroad employees. It protects the public against the slow death and the withering of entire communities, that always accompanies railroad consolidations. It is good for the railroad industry, because it will stay the hand of railroad financial interests which, instead of squeezing the water out of the capitalization of that industry, are bent upon reducing the physical plant of our great railroads, so necessary in time of war or in time of peace and prosperity . . . *By the adoption of this provision in the transportation bill, the government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers.* But this provision also contains a clause that permits the industry, through the process of collective bargaining, to work out its problems in a democratic manner.

"Without this labor protective provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. *With this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list; as deaths, resignations and retirements occur.* If S. 2009 will bring to the railroad industry the prosperity its supporters contend for it, then *the natural attrition will shortly have absorbed the employees that otherwise would be eliminated* if this Congress does not now deal with this problem." (Emphasis supplied.)
86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5871.

It was also pointed out that *not one member of the House expressed a contrary view* and one or perhaps two members thought that the modified language gave more protection to employees than did the original

language. It was emphasized that the modified language of the Harrington Amendment was restricted by the joint conference committee only as to the time it would be effective following a particular merger and this fact was confirmed even by the House members of that committee who had opposed both the original and modified language of the amendment.

The District Court was also informed that the continued substantive effect of the original language was confirmed by the official Senate interpretation of the provision placed in the Congressional Record by the Senate author of the 1940 Act, Senator Wheeler. 86 Cong. Rec., Part 10, 76th Cong., 3rd Sess., pp. 11766 and 11768.

Without discussing this legislative history the District Court states that the original language of the amendment was not adopted into law; that the Act contains no language equivalent to the original language; and, that "Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent." (Appendix A, p. 6a.)

3. The District Court relied on the "contemporaneous construction" doctrine holding that the Commission in its 1941 report "referred to 5(2)(f) as granting only compensatory benefits." (Appendix A, p. 6a.) The portion of the report relied on by the Court, however, merely states the type of conditions it imposed and makes no positive statement that such conditions are the only conditions required by Section 5(2)(f). At best this "contemporaneous construction" by the Commission is a negative construction. In any event, it was established by this Court in *Railway Labor*

Executives' Association v. United States, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 and *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373, 380, 67 S. Ct. 717, 86 L. Ed. 904, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.

4. The District Court relied heavily on articles, not introduced in evidence, from 1940 issues of magazines of five of the twenty-three railway brotherhoods affiliated through their chief executive officers with the Railway Labor Executives' Association. The Court states that these articles clearly assert the brotherhoods' understanding of Section 5(2)(f) as granting compensation to employees who lose their jobs as a consequence of merger. (Appendix A, p. 6a.) Reliance upon this type of material is clearly contrary to decisions of this Court such as *United States v. United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884. The articles cited are from magazines of a small minority of railroad brotherhoods and, at that, brotherhoods which *opposed* the Harrington Amendment because they felt insistence upon its enactment would kill the entire provision relating to mergers. In any event, the off-the-record opinions of laymen as to the effect of legislation upon them should have no bearing on the proper interpretation of that legislation by the courts.

5. Finally, the District Court relied upon a claimed Congressional awareness of the "construction" placed upon Section 5(2)(f) "by those interested in its integration and enforcement" and failure of Congress to do anything by way of clarification. (Appendix A, p. 7a.) Not only has there been no reason for the

Congress to modify Section 5(2)(f) regarding the protection it affords employees because the issue has never before been raised, but such a ground was rejected by this Court in *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904, as a means of interpreting the provisions of paragraphs 18 through 20 of section 1 of the Interstate Commerce Act (41 Stat. 477, 49 U.S.C. § 1(18)-(20)) subsequent to the passage of Section 5(2)(f).

6. The District Court also held that the plain language of the provision in question "mitigates against the plaintiffs' contention" because subparagraph (f) is "couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition much less that of guaranteed employment." (Appendix A, p. 4a.) The Court agrees that the controlling phrase is "in a worse position with respect to employment" (Appendix A, p. 4a) but claims that had Congress desired to protect employees with respect to their employment it would have followed the precise language it used in the 1933 Act or the after-enacted Communications Act of 1943, 57 Stat. 5, 47 U.S.C. § 222(f). The fallacy in the Court's reasoning here extends beyond its failure to give to the language of the controlling phrase, and particularly the term "employment", its ordinary, commonly accepted meaning because it also refused to recognize the obvious fact that Congress in modifying the Harrington Amendment combined into one phrase the words and substance of the two phrases contained in the employment protective provision of the 1933 Act. The District Court failed to acknowledge the additional fact that the legislative history of the

Communications Act of 1943 shows that Congress, in 1943 recognized that employment protection had been granted railroad labor in Section 5(2)(f). In addition, it seems reasonable to assume that if Congress had meant to protect employees only to the extent of lost compensation it would have done so merely by using the very familiar term contained in both the 1933 Act and the Washington Agreement which it had before it, namely, "no worse position with respect to compensation."

Further, the District Court affirmatively held that "no worse position with respect to employment" does not protect employment but makes no affirmative finding as to what it otherwise possibly could be intended to protect and yet holds that there is no "ambiguity within the structure of 5(2)(f)." (Appendix A, p. 5a.).

C.

1. The District Court in arriving at its decision in this case failed to apply the innumerable decisions of this Court applicable to statutory construction to the effect that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else is meant." *United States v. First National Bank*, 234 U.S. 245, 258, 34 S. Ct. 846, 58 L. Ed. 1298. See also *Western Union Teleg. Co. v. Lenroot*, 323 U.S. 490, 65 S. Ct. 335, 89 L. Ed. 414; *United States v. Resnick*, 299 U.S. 207, 57 S. Ct. 126, 81 L. Ed. 127; *Woolford Realty Co. v. Rose*, 286 U.S. 319, 52 S. Ct. 568, 76 L. Ed. 1128; *Southern R. Co. v. United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Columbia Water Power*

Co. v. Columbia Elec. Street R. L. & P. Co., 172 U.S. 475, 19 S. Ct. 247, 43 L. Ed. 521.

2. The District Court also failed to apply the rules laid down by the decisions of this Court in determining from legislative history the meaning of statutory words which may be in doubt. *Mastro Plastics Corp. et al. v. N.L.R.B.*, 350 U.S. 270, 288; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 76 S. Ct. 349, 100 L. Ed. 309.

3. As noted above, the District Court acted contrary to the rulings of this Court in relying upon off-the-record material contained in magazines as an aid in examining the legislative history of the statute. *United States v. United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884.

CONCLUSION

It is respectfully submitted that whether the protection afforded by Congress to shield the labor force of the railroad industry from the effects of wholesale mergers resulting from the enactment of Section 5(2)(f), as interpreted by this Court in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774, is to be granted or denied the employees comprising

that labor force, presents a substantial question for consideration by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Plaintiff,*

and

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

Before: O'SULLIVAN, Circuit Judge, LEVIN, Chief District Judge, and THORNTON, District Judge.

THORNTON, District Judge. A statutory three-judge court was convened pursuant to 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-25, to hear and determine the issue presented by the complaint here filed. This Court is asked to enjoin and set aside an order of the Interstate Commerce Commission (hereinafter also referred to as either the Commission or the ICC), dated September 13, 1960 and effective October 17, 1960, approving the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company. The argument upon which the relief sought is premised is single in its thrust. The issue for determination is a narrow one. The order of the Commission which is being attacked contains certain provisions pursuant to 49 U.S.C.A. § 512(f) of the Interstate Commerce Act (also known as the Transportation Act of 1940).

It is with the interpretation of 49 U.S.C.A. 5(2)(f), hereinafter referred to as 5(2)(f) that we are concerned. We here quote 5(2)(f), italicizing the words which are the crux of this controversy:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that *during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment*, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The sole question presented is whether this provision requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time to his service with the railroad carrier, not to exceed four years. The Commission, in its order of September 13, 1960, prescribed the so-called "New Orleans Conditions" which grant employees compensatory protection in the event of displacement or discharge.

We should perhaps here state that the merger has in fact gone ahead as per the effective date of the order with the exception of those terms which were imposed to comply with the provisions of 5(2)(f). The status of the employees of the merging railroads has not been disturbed pending this Court's decision. Such procedure was agreed upon by the respective parties at the time of the hearing on the motion for a temporary restraining order which was noticed for hearing, and held, shortly prior to the effective date of the Commission's order. The merged railroad, now the Erie-Lackawanna Railroad Company, has since become an intervening defendant by virtue of substitution for the two railroads.

To aid us in arriving at a proper conclusion the parties have submitted briefs, copies of reports relative to the proposed merger, copies of Congressional Committee reports and of pertinent sections of Congressional debates, copies of agreements (to protect employees) heretofore incorporated in prior railroad merger or combination proceedings, and copies of the proceedings before the Commission. The "New Orleans Conditions", above referred to and contained in the order of the Commission approving the merger, were compensatory protective conditions which were prescribed in ICC orders entered in railroad merger proceedings involving parties different from those here, such proceedings having taken place in New Orleans. The "New Orleans Conditions" do not embrace continued employment. We do not deem it important to our decision that these conditions be set forth here. It is plaintiffs' contention that *anything* short of actual continued employment is violative of the language and intendment of 5(2)(f) with respect to the phrase therein "being in a worse position with respect to their employment." Section 5(2)(f) requires protective conditions which are to be continued for a period of four years¹ for employees of the merging

¹ This is modified with respect to employees in the service of the railroad less than four years.

carriers. This is agreed. But the interpretation of the context of such benefits and of the mandate of 5(2)(f) is presented to us in two sharply contrasting outlines.

We believe it to be without dispute that this is the first instance since the 1940 enactment of 5(2)(f) that there has been an attempt to get judicial (or ICC, for that matter) recognition of the construction now placed by plaintiffs on 5(2)(f). In no case that has been called to the Court's attention has the construction urged by plaintiffs been placed on this Section. In no case has the proposition advanced here been previously advanced. In the numerous cases that have come before the ICC where 5(2)(f) conditions were required to be met, they were considered to have been met by various compensatory plans, continued employment not being one of them. From our reading of 5(2)(f) we are unable to find a clear expression, as plaintiffs contend, that continued employment of affected employees is required to be imposed. We believe that ordinary every-day logical reading of 5(2)(f) mitigates against plaintiffs' contention. The phrase here in issue, "in a worse position with respect to their employment" is couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition, much less that of guaranteed employment. It would appear to have been a simple matter to have incorporated the concept of continued employment in this sentence, had such been the intention of Congress. The plaintiffs' contention that the language "in a worse position with respect to their employment", being broader in scope than language granting "compensation", is that employees are required to be retained in an employment status following a merger. We do not agree that this language should be so construed. Congress could have used language clearly stating that the railroads may not discharge affected employees. Congress did precisely that in the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, and the Communications Act of 1943, 47 U.S.C.A. 222(f). It is our observa-

tion, therefore, that insofar as the plain language of 5(2)(f) is concerned, a literal approach giving effect to each phrase therein, necessitates denying the construction contended for by plaintiffs. This is to say that we do not consider that there is ambiguity within the structure of 5(2)(f). Under ordinary rules of statutory construction we would be precluded from pursuing any further line of inquiry. However, both parties to this cause claim support for their respective contentions in the legislative and operational history of the Act. We therefore review such history.

First, as the Act was originally proposed and adopted, it did not contain the specific language which is before us. As then proposed it clearly would not have called for job security or "job freeze" as a condition to authorizing a merger of railroads. It is clear also that Representative Harrington of Iowa sought to have an amendment adopted to the proposed Act which would provide that no employee should be displaced or his job impaired by a railroad merger. It appears that, as originally proposed, the so-called "Harrington Amendment" would have required such conditions to be imposed. From the offering of this amendment until the Act was finally adopted, the issue of whether or not "job freeze" should be a condition of any merger, was clearly and distinctly before the members of Congress. Whether such condition should be followed was discussed, pro and con, during the time this legislation was considered. The Harrington Amendment as originally proposed provided:

"No such transaction shall be approved by the Commission if such transaction shall result in *unemployment or displacement of employees of the carrier or carriers*, or in the impairment of existing employment rights of said employees."² (Emphasis supplied.)

Such amendment was not adopted into law, nor does the Act as it exists contain any language which might be said

²84 Cong. Rec. 9882 (1939).

to be equivalent to what Mr. Harrington proposed. It is clear that the members of Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent.

Second, at the time of, and following, the enactment of the Section now before us, representatives of the plaintiffs in this cause gave public expression to, and understanding of, what was accomplished by the Section before us, and clearly asserted that it was their understanding that protection was to be afforded by way of compensation to such employees as would lose their jobs or be displaced as a consequence of a merger.³

Third, the application and construction of the Section have been before the ICC in many cases during the twenty years since the enactment of the Transportation Act of 1940. Consistently and clearly, the ICC has interpreted the particular language in the same manner as it now contends it should be construed. It is true that the issue now made by plaintiffs in this case was not presented to, nor passed upon, by the ICC in any of the cases adjudicated in the preceding twenty years. Neither, however, did these plaintiffs, as representatives of the employees involved, there make the contention that is being made in the instant proceeding. The ICC in its 1941 report referred to 5(2)(f) as granting only compensatory benefits. Such a contemporaneous administrative construction of a statute is entitled to great weight and indeed the Commission has never deviated from that interpretation. The plaintiffs contend that they have never chal-

³ See *Brotherhood of Maintenance of Way Employees' Journal*, volume XLIX, pages 13 and 14 (October 1940); *The Railway Conductor*, volume 57, page 306 (October 1940); *Locomotive Engineers' Journal*, page 725 (October 1940); *Brotherhood of Locomotive Firemen and Enginemen's Magazine*, page 223 (October 1940); *Railway Clerk, Official Journal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, pages 467 and 488.

lenged the Commission's interpretation because only in recent years have wholesale mergers occurred in the railroad industry with the resultant effect of a reduction in employment opportunities. However, in at least one prior large scale merger compensatory relief was afforded employees.⁴

Fourth, it is clear also that since 1940 the United States Congress has been aware of the construction placed upon the Act by those interested in its interpretation and enforcement. It has not seen fit to indicate by any attempted clarification of the Act its disagreement with the construction uniformly placed upon it in the intervening years.

Two decisions of the Supreme Court which have been cited and argued by all parties to this controversy in support of their respective positions should be mentioned. This Court, however, deems both decisions inapposite to the issue here. In *Railway Executives Association v. United States*, 339 U.S. 142 (1950), the Supreme Court held that the four-year limitation in 5(2)(f) provided only a minimum period of protection for employees and that the first sentence of 5(2)(f) still required the Commission to arrange a fair and equitable solution and protect the interests of the railroad employees. In *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1960), the sole question was whether a strike arising out of the railroad carriers' refusal to negotiate an agreement with a union that would prevent the railroad from abolishing any position was a "labor dispute" within the meaning of the Norris-LaGuardia Act. It is interesting to note that in this decision Mr. Justice Whittaker, writing for the four dissenting justices, spe-

⁴The Louisville and Nashville Railroad Company Merger, 295-ICC 457 (1957), affirmed *City of Nashville, Tennessee v. United States*, 155 F. Supp. 98 (M.D. Tenn. 1957) affirmed 355 U.S. 63 (1957).

cifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to "freeze existing jobs". The majority opinion, however, never reached this question.

One additional observation may be in order. The decision of this Court that 5(2)(f) provides only compensatory benefits is supported by the general policy of the ICC which is to promote "safe, adequate, and efficient service and foster sound economic conditions in transportation." A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy partially through the reduction of personnel. It seems to us that if Congress had intended such a result it could have, and would have, said so in unequivocal language.

The temporary restraining order will be set aside and the complaint dismissed. An order in accordance with the foregoing may be presented.

S/ CLIFFORD O'SULLIVAN
Circuit Judge

S/ THEODORE LEVIN
*Chief Judge, United States
District Court*

S/ THOMAS P. THORNTON
United States District Judge

Dated at Detroit, Michigan, this 7th day of December,
1960.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 20575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *Plaintiff*,
and
RAILWAY LABOR EXECUTIVES ASSOCIATION,
Intervener Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,
and
ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant.

Order

At a session of said Court held in the Federal Building,
City of Detroit, Wayne County, Michigan, on the
19th day of December, 1960.

This cause having been briefed and argued on the merits
by counsel for the respective parties and having been fully
submitted at the close of hearing on November 15, 1960,
and

This Court, after due consideration, having rendered
its decision and stated the grounds therefor in its Opinion
dated and filed December 7, 1960,

Now, THEREFORE, in conformity with said Opinion,

It **is** HEREBY ORDERED THAT:

1. Plaintiffs' request for injunctive relief be and hereby
is denied and the above-entitled action and the Complaint
therein be and they hereby are dismissed with prejudice
to Plaintiffs.

2. The temporary restraining order entered October 14, 1960 be and hereby is set aside and rendered null, void and of no effect.

CLIFFORD O'SULLIVAN,
Circuit Judge

THEODORE LEVIN,
*Chief Judge, United States
District Court*

THOMAS P. THORNTON,
United States District Judge

A True Copy

JOHN J. GINTHER, *Clerk*
By RAYMOND W. BILTON
Deputy Clerk

FILE COPY

Office-Supreme Court, U.S.

FILED

FEB 3 1961

JAMES R. BRUNNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES,

Plaintiff-Appellant,

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Intervener Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,

Defendant-Appellees,

and

ERIE-LACKAWANNA RAILROAD COMPANY,

Intervener Defendant-Appellee.

**MEMORANDUM OF APPELLEE ERIE-LACKAWANNA
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February 3, 1961

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Interstate Commerce Act,	
§ 5(2), 49 U. S. C. 5(2)	2, 4, 10
§ 5(2)(f), 49 U. S. C. 5(2)(f)	2, 3, 4, 6, 7, 8, 9, 10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES,
Plaintiff-Appellant,

and

RAILWAY LABOR EXECUTIVES'
ASSOCIATION,
Intervener Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA and INTER-
STATE COMMERCE COMMISSION,
Defendant-Appellees,

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant-Appellee.

No. 681

**MEMORANDUM OF APPELLEE ERIE-LACKAWANNA
RAILROAD COMPANY AND APPENDIX**

On January 23, 1961, this Court denied appellants' application for a stay pending appeal without prejudice to its renewal upon prompt docketing of the appeal. Appellants have docketed their appeal and renewed their application for a stay.

The purpose of this memorandum on behalf of Erie-Lackawanna Railroad Company (hereinafter referred to as Erie-Lackawanna) is three-fold: First, to define properly the sole question presented to this Court on this appeal; second, to demonstrate that the renewed application for a stay should be denied; and third, to set forth the reasons why the Erie-Lackawanna, although it believes that summary affirmance without argument is appropriate, wishes to waive its right to file a motion to affirm.

I

THIS COURT SHOULD LIMIT ITS CONSIDERATION TO THE SOLE QUESTION RAISED BY APPELLANTS BEFORE THE COMMISSION AND THE COURT BELOW.

The Jurisdictional Statement asserts that five questions are presented for review (pp. 5-6). In fact, however, as the Jurisdictional Statement itself demonstrates, there is only a single question presented* (see, generally, pp. 11-25, and particularly pp. 11, 12, 13 and 25). The sole question raised by appellants before the Interstate Commerce Commission (hereinafter referred to as the Commission) and the court below, properly stated, is

Whether Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906, 49 U. S. C. § 5(2)(f)) requires the Commission to impose as a minimum, upon every transaction approved under Section 5(2) the requirement that every employee affected by an approved transaction must be retained in an active employment status for a period equal in time with his service to the railroad, not to exceed four years.

*The fifth question presented by appellants raises a procedural problem, unsubstantial on its face and virtually abandoned in the Jurisdictional Statement.

Preservation of an active employment status does not mean continuation of each and every employee in precisely the same job that he held prior to the effective date of the merger—a “job freeze”. Appellants have repeatedly stated that their version of Section 5(2)(f) of the Act would not require that result.

The Railway Labor Executives’ Association (hereinafter referred to as RLEA) first raised the sole question after the record before the hearing examiner was closed. The conditions sought by RLEA appear at Appendix F to the examiner’s recommended report and provide (R.—* Examiner’s Proposed Report, App. F, p. 2):

“It should be the intent and effect of the foregoing conditions that all employees adversely affected by the merger prior to a date four years from the effective date of the order of approval are to receive as a minimum the protection afforded by the second sentence of Section 5(2)(f), namely, *complete preservation of employment for four years, . . .*” (emphasis added)

That was the sole question considered by the full Commission, as follows (Report of The Commission, sheet 11):

“The association [RLEA] contends that section 5(2)(f) of the act requires the prescription of labor protective conditions adequate to assure the employment of all adversely affected employees for a minimum of 4 years after the effective date of the merger, rather than the providing of compensation in lieu of employment.”

That was the single question raised by appellants in the court below and the sole question considered by that court.

*The pages of the certified record on file with this Court have not been numbered.

At the argument on the merits before the District Court, appellants' counsel stated (Transcript of Hearing, Nov. 15, 1960, p. 22):

✓ "The jobs can be changed and employees may have to move. They may get other jobs. But they have to be comparable jobs at comparable wages. The jobs are not necessarily frozen.

That is our position."

Accordingly, in its opinion, the District Court clearly defined the issue presented for its decision. (Jurisdictional Statement 2a, 3a):

"The sole question presented is whether this provision requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time with his service to the railroad carrier, not to exceed four years."

* * *

"It is plaintiffs' [appellants here] contention that *anything* short of actual continued employment is violative of the language and intendment of Section 5(2)(f) with respect to the phrase therein 'being in a worse position with respect to their employment'." (emphasis in original)

Accordingly, Erie-Lackwanna submits that if the Court notes probable jurisdiction, it should limit consideration to this single question.

II

THE RENEWED APPLICATION FOR A STAY SHOULD BE DENIED.

Appellants do not advance one new argument or fact to support granting a stay which was not before this Court when it entered the order of January 23, 1961.* Appellants rely simply upon the unsworn statements in their original papers, elaborated somewhat in their Jurisdictional Statement.

In opposing the original application for a stay, Erie-Lackawanna pointed out the numerous reasons why a stay should be denied.

First, a stay would be contrary to the public interest. As the Commission found, Erie-Lackawanna should be allowed to effect the economies in service contemplated by the merger plan and thus maintain its service to the public. Therefore, in accordance with *Virginian Ry. v. United States*, 272 U. S. 658 (1926), appellants would not be entitled to a stay even if they had clearly established some irreparable harm.

Second, appellants have made no factual showing of actual harm of any kind. On this crucial issue appellants offer only speculation as to what may happen.

*For the convenience of the Court, since only a single set of papers has been previously filed, we are printing as appendices to this Memorandum the relevant material as follows:

Appendix A—the temporary restraining order entered by Judge Thornton as a single judge, prior to impaneling of the three-judge court, which that court, after deciding adversely on the merits to appellants, and after further hearing on a stay pending appeal, refused to continue in effect. It is this temporary restraining order which appellants seek to reinstate by their renewed application for a stay.

Appendix B—Appellants' original motion for a stay, addressed to Justice Stewart.

Third, the Erie-Lackawanna is in a precarious financial position, which has been compounded and aggravated by its inability to merge operations and functions and to establish the economies which the merger plan contemplated. Its critical financial situation has been described in the White affidavit, Appendix C, at pp. 3-6, and, more current figures filed with the Commission since that affidavit was prepared demonstrate that the situation further deteriorated in the month of December 1960. In that month, Erie-Lackawanna suffered an operating loss of \$3,866,439.69, bringing its operating loss for the year 1960 to \$19,995,613.86.

Fourth, a special three-judge district court unanimously affirmed a unanimous order of the Commission rejecting the interpretation of Section 5(2)(f) of the Interstate Commerce Act contended for by appellants, and, that court, thoroughly familiar with the record, unanimously denied a stay pending appeal.

Finally, Erie-Lackawanna, mindful of the desirability of minimizing inconvenience to individual employees, made specific representations regarding how it would proceed in the absence of a stay in carrying out the merger.

In the light of those facts, and particularly the representations of Erie-Lackawanna, this Court denied appellants' application.

Appendix C—Erie-Lackawanna's memorandum opposing that motion, with attached affidavit of Garrett C. White.

Appendix D—Erie-Lackawanna's supplemental statement opposing such motion.

Appendix E—Memorandum for the United States and the Interstate Commerce Commission opposing that motion.

Appendix F—Appellants' reply.

Appendix G—The order of this Court denying the application for stay without prejudice.

Appendix H—Appellants' renewed application for a stay.

In their renewed application appellants rely on two of the grounds raised in their original application. Essentially, those grounds are, as follows:

1. Appellants contend that, unless Erie-Lackawanna is restrained, it will take action "which will render the status quo impossible of subsequent restoration and thereby will effectively deprive appellants of their statutory right of appeal" (see Appendix H).

That claim of mootness is specious. As pointed out in Erie-Lackawanna's initial opposition to the motion for stay, the plan of merger will take five years to effectuate and, hence, many employees will not feel the impact of the merger until a substantial portion of that period has expired.* In addition, it is clear that a claim of technical mootness in a case of this nature will not defeat jurisdiction of this Court (see authorities cited in Appendix C at p. 32a). Accordingly, appellants' claim of mootness is groundless.

2. The sole remaining ground urged upon this Court as a justification for the granting of a stay is that jobs will be abolished, "bumping" will ensue and employees will be required to move. The renewed application seeks to prevent Erie-Lackawanna from abolishing jobs or moving employees. Such a job freeze would be far broader than the relief which appellants seek on the merits. Appellants do not contend that Section 5(2)(f) of the Interstate Commerce Act prohibits abolition of jobs or transfer of employees. Appellants have contended throughout this proceeding only that Section 5(2)(f) requires Erie-Lackawanna to maintain all employees in an *active employment status* and have readily conceded that job abolishment and

*That fact is conceded by appellants at numerous places, e.g., the second QUESTION PRESENTED at page 5 of appellants' JURISDICTION STATEMENT.

job transfer are a necessary part of the conditions which they seek. (See p. 4, *supra*)

As to "bumping"—the displacement of junior employees by senior employees—that process is created by the union seniority system and is governed by agreements with the various unions. "Bumping" does result from job abolishment and job transfer, but it is not something against which appellants claim Section 5(2)(f) protects employees affected by the merger. It is an orderly process, pursuant to agreement between the railroad and the various unions, which will necessarily follow the imposition of the New Orleans conditions, or of the condition sought by appellants, when jobs are abolished or transferred.

Moreover, the spectre of "bumping" and the image of families in aimless transit which emerge from the various papers filed on behalf of appellants are dispelled by the assurances of careful planning in Erie-Lackawanna's supplemental memorandum of January 12, 1961.

In accordance with those assurances, Erie-Lackawanna has made no job transfer as a result of merger which has required a change of residence by an employee represented by appellants. Further, Erie-Lackawanna has authorized us to assure this Court that, pending decision on the merits, all planned job transfers of employees represented by appellants which will require a change of residence will be transfers to regular job assignments in accordance with applicable agreements with the labor organizations governing the rights of individual employees.

Finally, Erie-Lackawanna, for the reasons stated herein, will waive the right to file a separate motion to affirm in order to expedite final determination of this matter.

III

**THE REASONS WHY ERIE-LACKAWANNA IS WAIVING
THE FILING OF A MOTION TO AFFIRM.**

Although Erie-Lackawanna believes that a motion to affirm would be proper, it hereby waives its rights to file such a motion, and is ready to meet any accelerated briefing schedule if this Court should desire argument on the merits.

Erie-Lackawanna believes that the question presented is simple and that the opinion below was clearly correct. However, we recognize that if the Court should decide to note probable jurisdiction and hear oral argument on the question presented, the filing of a motion to affirm and appellants' opposition thereto would merely delay final determination. It is of crucial importance to Erie-Lackawanna that final resolution be achieved as rapidly as possible. Accordingly, should this Court determine that oral argument and further briefing are desirable, Erie-Lackawanna requests an accelerated schedule in order that there may be an early determination on the merits.

In waiving its right to file a motion to affirm, Erie-Lackawanna recognizes that it is for the Court to determine whether plenary consideration is warranted. It is submitted that the opinions of the Commission and the district court are so plainly correct that it would not be inappropriate for this Court, on its own motion, to affirm summarily on the basis of those opinions. As the Court below held, the plain language of the pertinent part of Section 5(2)(f) clearly does not require as a minimum that all employees be continued in an active employment status. In contrast, it is to be noted that when Congress desired to impose such an employment freeze, it used language specifically requiring that result. (See the Emergency Railroad Transportation Act of 1933, 48 Stat.

211 and the Communications Act of 1943, 47 U. S. C. 222(f).)

With respect to the legislative history of the critical portion of Section 5(2)(f), appellants are faced with the impossible task of demonstrating that the language of the rejected Harrington amendment which provided "that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of a carrier or carriers, or the impairment of existing employment rights of said employees" means exactly the same thing as the language of Section 5(2)(f) that no employees shall be "in a worse position with respect to their employment". Such a demonstration, however nimbly articulated, flies in the face of reality and common sense.

Accordingly, the Commission has, during the twenty-year life of the disputed provision, consistently imposed compensatory conditions upon all transactions approved under Section 5(2). In those numerous proceedings the RLEA has repeatedly concurred. This Court, in so far as it has had occasion to deal with the problems raised by this appeal, has indicated that Section 5(2)(f) does not require complete preservation of employment. *Railway Labor Executives' Association v. United States*, 339 U. S. 142 (1950); *Order of Railroad Telegraphers v. Chicago and N. W. Ry.*, 362 U. S. 330, 345 (dissenting opinion 1960).

Moreover, the policy reasons for rejecting appellants' contentions are sound and well considered. As the Court below held, the construction for which appellants contend "would sterilize provisions of the Act which is designed to promote economy partially through the reduction of personnel. It seems to us that if Congress had intended such a result it could have, and would have, said so in unequivocal language." (Jurisdictional Statement 8a) Similarly, the

Commission in rejecting appellants' contention stated (Report of the Commission, sheets 17-18):

"In our opinion, the association's newly asserted position that the act requires us to maintain railway employees in their jobs is incorrect and untenable. Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

CONCLUSION

For the foregoing reasons, the renewed application for a stay should be denied, and, if this Court should decide to note probable jurisdiction, it should fix a schedule which will permit the appeal to be briefed, argued and disposed of during the present Term.

February 3, 1961.

Respectfully submitted,

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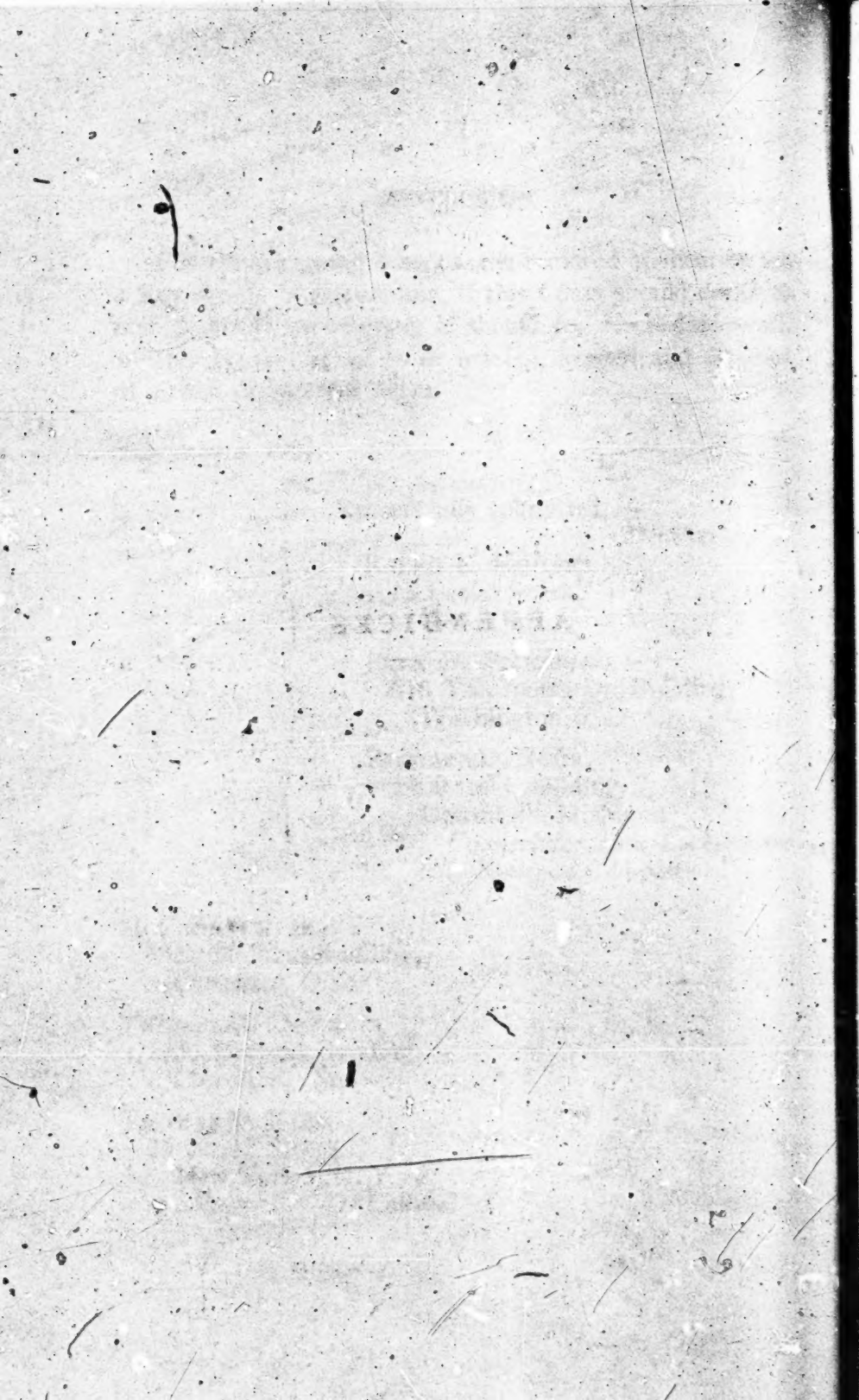
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APPENDICES



APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES and RAILWAY LABOR EXEC-
UTIVES' ASSOCIATION, Intervenor,
Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, and DELA-
WARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY and ERIE RAIL-
ROAD COMPANY, Intervenor,
Defendants.

Civil Action
No. 20575

At a session of said Court held at Detroit, Michigan,
on the 14th day of October, 1960.

Present: HONORABLE THOMAS P. THORNTON,
District Judge

Plaintiff Brotherhood of Maintenance of Way Em-
ployes having filed its complaint challenging an order of
the defendant Interstate Commerce Commission (entered
September 13, 1960 effective October 15, 1960) approving
of a merger of the Delaware, Lackawanna and Western

Appendix A

Railroad Company and the Erie Railroad Company, and said railroad companies having intervened as additional parties defendant and the Railway Labor Executives' Association having intervened as an additional party plaintiff, and said plaintiffs having applied for the issuance of an order restraining the operation of the said merger order until plaintiffs' application for an interlocutory injunction can be heard and determined by a three-judge court in accordance with 28 USC §§ 2284 and 2335, all of the defendants having been given notice of the hearing on said application for restraining order, said application having come on for hearing, evidence having been taken and counsel for all of the parties having been heard, and

Plaintiffs having requested that said merger order be restrained only insofar as it adversely affects the employment of employees represented by Plaintiffs, and

Plaintiffs and said railroad defendants having agreed that on October 17, 1960 the merged company, Erie-Lackawanna Railroad Company (Erie-Lackawanna) will take into its active employment all employees of the Erie Railroad Company and the Delaware Lackawanna and Western Railroad Company, represented by the Brotherhood of Maintenance of Way Employees (BOMW) or any other labor organization whose chief executive is a member of the Railway Labor Executives Association (RLEA), who had an active employment status (i.e. not on furlough) on October 12, 1960; this provision not to adversely affect the rights of employees of the Erie or the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who were on furlough on October 12, 1960

*Appendix A***IT IS ORDERED THAT:**

The Erie-Lackawanna shall not abolish the position of, or furlough, any employee represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who had an active employment status with either the Erie or the Lackawanna railroad companies on October 12, 1960, by reason of the merger of these railroad companies, pending the entry of further order by this court, sitting as a statutory three-judge court in this proceeding.

This restraining order shall not prevent the Erie Lackawanna from consolidating any functions of the merged company and transferring such positions as are required for such consolidations, but no employee of the Erie or of the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA holding an active employment status on October 12, 1960 shall be required to transfer his place of employment pending the entry of a further order by this court sitting as a statutory three-judge court in this proceeding, except pursuant to the terms of an interim and/or implementing agreement with the appropriate collective bargaining representative representing such employee pursuant to the provisions of the Railway Labor Act, provided, that nothing in this order shall supersede any interim and/or implementing agreement which heretofore may have been entered into between the Erie and/or the Lackawanna and any such collective bargaining representative.

The Court specifically finds that unless this restraining order is issued, irreparable damage will result to the employees represented by said plaintiffs, which finding is based upon the testimony and exhibits of Harold C. Crotty that

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the merger, if not so restrained, will cause the dislocation and displacement of some of such employees by the abolition of employment, the required exercise of seniority rights, the movement of employees and their families, and the loss of fringe benefits and annuity rights by some employees and that if such effects are not restrained it will be impossible to subsequently restore the status quo.

THOMAS P. THORNTON
District Judge

A TRUE COPY
John J. Ginther, Clerk

By /s/ Frederick M. Johnson
Deputy Clerk

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES
UNDOKETED, OCTOBER TERM, 1060

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES and RAILWAY LABOR EXEC-
UTIVES' ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, and ERIE-
LACKAWANNA RAILROAD COMPANY,

Appellees.

ON APPEAL FROM THE DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

MOTION FOR STAY

To the HONORABLE POTTER STEWART, Associate Justice of
the Supreme Court of the United States:

The appellants, Brotherhood of Maintenance of Way
Employees and Railway Labor Executives' Association,
having under date of January 9, 1961, filed their Notice
of Appeal from an Order of the United States District
Court for the Eastern District of Michigan, Southern Divi-
sion, a copy of which Notice is hereto appended, respect-
fully move the Court for an order staying the effect of the
said Order of the District Court insofar as it lifts the tem-
porary restraining order theretofore entered by that court
pending final disposition of this appeal by this Court.

Appendix B**I****STATEMENT AS TO APPLICATION PREVIOUSLY MADE**

On December 8, 1960, the Appellants made application to the Honorable Clifford O'Sullivan, Circuit Judge, the Honorable Theodore Levin, Chief District Judge, and the Honorable Thomas P. Thornton, District Judge, being the judges who entered the Order dismissing the complaint and lifting the temporary restraining order, for the purpose of securing a stay of the lifting of the temporary restraining order pending final disposition by this Court of the appeal from said Order of the District Court, and on December 19, 1960, the said judges entered an order denying the application for a stay, copy of which is attached hereto.

II**BRIEF SUMMARY STATEMENT AS TO THE BASIS OF
THE CASE**

This case involves a suit to set aside, enjoin, annul and suspend, in part, an order of the Interstate Commerce Commission issued pursuant to Section 5(2) of the Interstate Commerce Act [49 U. S. C. 5(2)]. The Commission's order approved the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company subject to certain conditions. The object of the suit is to restrain and enjoin that part of the Commission's order which permits the abolishment of jobs and the dislocation of employees until such time as the employee protective conditions required by Section 5(2)(f) can be imposed. The Commission held that subparagraph (f) of Section 5(2)

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does not require that employees be protected with respect to their employment but need merely be given partial financial compensation in lieu of employment even though subparagraph (f) specifically provides that in approving a transaction subject to Section 5(2) the Commission shall provide in its order of approval terms and conditions which require that for a period of up to four years from its date, depending upon an employee's length of service, the transaction approved shall not result in employees of the railroad carriers affected "being placed in a worse position with respect to their employment" than they otherwise would have been.

The Commission's conditions provided for partial financial compensation to employees who would be deprived of their employment, placed in lower paying jobs, or required to move as a result of the approved transaction.

The conditions providing such compensation are commonly referred to as the "New Orleans conditions" and are an outgrowth of the decision of this Court in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, which involved the New Orleans Union Passenger Terminal, hence the name "New Orleans conditions".

The appellants challenged the imposition of these conditions as violative of the requirements of the provision of Section 5(2)(f) above noted in the particular circumstances surrounding this case; circumstances which had not arisen in the twenty-year history of the statute. The appellants informed the Commission that such challenge had not been theretofore made because the full protection provided by Section 5(2)(f) previously had not been required as the existence of Section 5(2)(f) had never before threatened the entire labor force of the railroad industry.

Subparagraph (f) had been enacted in 1940 to protect the railroad labor force from the effects of wholesale

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mergers and consolidations which the authors of Section 5(2) envisioned as following immediately upon enactment of that provision. Such wholesale mergers did not take place in 1940 or 1941 and indeed did not come about until 1959 and 1960 when the railroads, apparently *en masse*, decided to exercise the rights which Congress had granted them in 1940 to accomplish the very type of mergers which the authors of Section 5(2) had in mind when they drafted that provision and the employee protective provisions found in subparagraph (f).

At the present time there are now contemplated some ten major railroad mergers. The majority of the savings to be realized by the railroads through these mergers admittedly are realized primarily at the expense of the railroad labor force through the abolishment and transfer of jobs.

Since the railroads only now have decided to exercise the rights which were granted them by Congress in 1940 under Section 5(2) and thereby directly threaten the labor force of the railroad industry, the appellants called for the imposition of those conditions which Congress granted them in the 1940 Act and which Congress intended be afforded railroad employees where a wholesale threat to employment in the industry is presented.

The appellants took the position before the Commission and before the Court below that the plain language of the statute, its legislative history and the interpretation placed on that statute by this Court in its decisions in *Railway Labor Executives' Association v. United States*, 339 U. S. 142 (1950) and *The Order of Railroad Telegraphers v. The Chicago and Northwestern Railway Co.*, 362 U. S. 330 (1950), clearly require the Commission to condition ap-

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proval of a merger upon a requirement that for a period of up to four years following Commission approval (depending upon the length of service of the particular employees involved) the merged railroad provide equivalent jobs at equivalent pay to all employees and that, at least for that period of time, the savings to be realized at the expense of the labor force occur through the process of natural attrition, i.e., as deaths, retirements, resignations, etc., take place. (See copy of appellants' brief and reply memorandum filed with lower court which is attached hereto.) Such a requirement could have no adverse effect on the merged railroad since, according to its own testimony, the rate of jobs created by attrition exceeded the number of jobs to be abolished by 600%. (See "Study XVI, Schedule A" of Railroads' Exhibit No. H-48 before the Commission attached hereto.)

III

JURISDICTION

The jurisdiction of this Court to entertain appellants' appeal from the order of the lower court rests upon 28 U. S. C. § 1253.

IV

THE RULING BELOW AND THE REASON FOR APPEAL

The court below held that the words "in a worse position with respect to their employment" do not mean that an employee may not be deprived of his employment and its concomitant rights. The court, however, does not state precisely what else such language could possibly mean. In addition, after holding that the requirement that an employee

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could not be placed "in a worse position with respect to his employment" did not mean that he could not be deprived of, or otherwise worsened with respect to his employment the court went on to hold that the language was not ambiguous.

The appellants prosecute their appeal to this Court, not only because it is their statutory right to do so under 28 U. S. C. § 1253 but primarily because of the imminent threat facing the entire railroad labor force in the United States as a result of the sudden and extensive exercise by the railroads of the statutory authority granted over twenty years ago. This appeal is also prosecuted because the decision below misinterpreted the plain language of Section 5(2)(f), ignored the overwhelming evidence to be found in the legislative history of this statute and failed to apply and is in conflict with the interpretation placed upon Section 5(2)(f) by this Court in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, and *The Order of Railroad Telegraphers, et al. v. Chicago and North Western Railway Company*, 362 U. S. 330. (See copy of opinion of three-judge court attached hereto.)

V

REASON FOR REQUESTING A STAY

Unless a stay of the judgment and order below is granted, at least insofar as it lifts the temporary restraining order, appellants and the employees they represent will be irreparably injured during the pendency of the case in the Supreme Court and will be deprived of their statutory right to have their cause reviewed by this Court.

The temporary restraining order issued below was not granted *ex parte*. It was granted after a full hearing in

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open court which convened at 9:30 A. M. on October 12, 1960, and adjourned at approximately 4:00 P. M. the same day and at which time all parties were given opportunity to present and cross-examine witnesses and introduce all relevant testimony and exhibits and from which was developed a record covering 132 typewritten transcript pages and seven exhibits.

Toward the close of the hearing the Court made the following findings with regard to irreparable injury (transcript of hearing, October 12, 1960, pages 120-121):

"THE COURT: I am going to grant the motion for the temporary restraining order on the basis of testimony adduced by the plaintiff through the person of Mr. Crotty, who is presently President of the Maintenance of Way Employees, and who has held that office for two years, and who held the office of Assistant President for a period of eight or ten years prior to the two years that he has been President.

"He qualified as an expert. I was impressed with his honesty, his sincerity and frankness, and he appeared to me as a witness that answered honestly the questions that were put to him by the direct examination as well as the cross examination.

"He testified that the reimbursement for the moving in the event that an employee is required to move by virtue of the merger only encompasses the original moving, and, if there is a bumping that involves more than one moving, any subsequent moving would not be paid for by the railroad.

"He testified that fringe benefits would become inoperative.

"He testified that annuity rights might be jeopardized; that employees of ten years or more seniority would probably not be disturbed in their annuity rights, but anybody with less than ten years

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of seniority would have his account transferred to Social Security.

"He testified it would be impossible, in his opinion—and he was speaking as an expert in my opinion—to place the men back in status quo in the event that they were dislocated by virtue of the merger.

"And, I find as a fact that those different items add up to irreparable damage when it is testified by the expert that it would be his conclusion that there would be a great possibility that those rights would be lost forever."

On October 14, 1960, the Court entered its temporary restraining order, a copy of which is appended hereto, which states, in part, as follows:

"The Court specifically finds that unless this restraining order is issued, irreparable damage will result to the employees represented by said plaintiffs, which finding is based upon the testimony and exhibits of Harold C. Crotty that the merger, if not so restrained, will cause the dislocation and displacement of some of such employees by the abolition of employment, the required exercise of seniority rights, the movement of employees and their families, and the loss of fringe benefits and annuity rights by some employees and that if such effects are not restrained it will be impossible to subsequently restore the status quo."

The explicit finding of the court below is that unless the status quo with regard to employees is maintained the employees represented by plaintiffs will be irreparably damaged and if the effects of the merger insofar as employees are concerned is not restrained "it will be impossible subsequently to restore the status quo." That finding was never

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modified by the lower court nor did the court receive any further evidence on this subject.

Since, as the lower court found, irreparable harm will result to the employees represented by plaintiffs if the *status quo* as preserved by the temporary restraining order is destroyed; since "it will be impossible subsequently to restore the *status quo*"; and since the precise object of this case, the injunction against job abolishments and dislocation of employees pending imposition of the protective conditions required by Section 5(2)(f), will be destroyed by the lifting of the temporary restraining order, the plaintiffs will be deprived of their statutory right to have their case reviewed by the Supreme Court of the United States if the temporary restraining order is not continued pending appeal to this Court.

Should the temporary restraining order not be continued and the job abolishments and transfers take place, the irreparable damage noted above will result to employees and the Supreme Court will be confronted with a *fait accompli* about which it could do nothing. The Supreme Court would be faced with deciding a sterile question of law which may result in the dismissal of the appeal as moot. In the case of *Pink, et al. v. Continental Foundry & Machine Company, et al.*, 240 F. 2d 369 (1957), the United States Court of Appeals for the Seventh Circuit dismissed an appeal to the United States District Court for the Northern District of Indiana, Hammond Division, on the grounds that the appeal had become moot. In that case minority stockholders brought an action to enjoin the sale of corporate assets and the liquidation of a corporation. The plaintiffs in that case, however, did not join the purchaser of the assets as a party defendant and when the stockholders' suit was dismissed

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they made no attempt to have the status quo maintained pending appeal. During the pendency of the appeal the sale of the assets was completed and such assets passed from the court's jurisdiction by the act of the corporation, but without fault on its part, and the Court of Appeals held that there was nothing it could do to restore the status quo should the stockholders' appeal be upheld. Therefore, the appeal had become moot and was dismissed.

In the course of its opinion, the Court said (240 F. 2d at 374):

"The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. *Selected Products Corporation v. Humphreys*, *Supra*, citing many cases. The court went to say [86 F. 2d 823]: 'There must be an actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore, if by act of the parties or otherwise the circumstances have so changed that it is impossible or unnecessary for the appellate court to grant relief.' Among the cases that were cited in support of the above principle is *American Book Co. v. State of Kansas*, 193 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 618, which, in turn, cited *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293, where the court said: 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a judgment of a lower court, and without any fault

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of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

If the temporary restraining order is not reinstated, this Court would find it impossible to restore the status quo and therefore a decision of this Court upholding the plaintiffs' cause of action could not be carried out by the imposition of the employment protection conditions required by Section 5(2)(f).

Should the temporary restraining order not be reinstated and the defendant railroad abolishes and transfers jobs in pursuance of its merger plans, the employees' only protective rights will be found in the provisions of the so-called New Orleans conditions, the Washington Agreement and other agreements now in effect between the railroad and the representatives of its employees.¹

Should the railroad abolish and transfer jobs, the partial financial compensation provided by the so-called New Orleans conditions theoretically will become operative. However, no payments to employees pursuant to such conditions are made unless so-called implementing agreements are executed by the railroad and representatives of employees affected providing a method of presentation of claims and payments of compensation. The plaintiffs will be unable to permit the employees which they represent to be deprived of their livelihood or undergo the great expense which a change in residence often incurs without executing imple-

¹A pamphlet copy of the "New Orleans" conditions, the Washington Agreement and other types of conditions imposed by the Commission is attached hereto.

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menting agreements which will enable such affected employees to receive the partial financial compensation provided by the New Orleans conditions. Once such agreements are entered into and benefits thereunder are accepted, the very purpose of this action will be destroyed and an appeal to the Supreme Court from the decision of the lower court may be then dismissed as moot.

The temporary restraining order should be continued unless plaintiffs' case is patently frivolous which, we respectfully submit, it clearly is not, but even that question should be presented to the Supreme Court for decision. Such a decision from this Court can be obtained almost immediately by the filing of a motion to affirm.

If the motion to affirm were granted the matter would be swiftly closed but if such a motion were denied and probable jurisdiction were noted it seems obvious that plaintiffs' statutory right of review and this Court's intention to review should not be thwarted by the lifting of the temporary restraining order.

At the hearing before the three-judge statutory court on the plaintiffs' motion for stay pending appeal to this Court no evidence regarding irreparable damage or mootness was received by that court, however, Circuit Judge O'Sullivan, presiding, made the following statement from the bench in contradiction of the previous specific findings of the court which were based upon the evidence adduced at the October 12, 1960, hearing (Transcript of hearing, December 19, 1960, pp. 45-46):

"I think I might say this much—at least it is my own thinking and I believe the other members of this Court are not in disagreement with me—that I have such confidence in the judicial processes avail-

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able to the litigants in this case, particularly the plaintiffs, that if our decision here is erroneous and the Supreme Court feels that the relief prayed for in the Bill of Complaint should be granted and issues its mandate, then our courts and administrative agencies are not without the power and resourcefulness that will provide protection of all the persons here represented by plaintiffs.

"We have seen that in the National Labor Relations Board many times. They have been faced with what you might be pleased to call 'unscrambling,' but the fact that difficulties had been encountered did not stay them from proceeding to carry out what they thought was right to protect employees that had been hurt or injured by some difficulty that had arisen in the area of labor and management relations.

"We think that the railroad is going to have to obey any mandate that may come out of the Supreme Court. And I am not of the opinion that this case will be rendered moot by our refusal of a stay order at this time.

"And, if our decision is correct, then, of course, the New Orleans conditions are going to be applied. If the decision is reversed, directions can be made by the Supreme Court in sending it back to the Interstate Commerce Commission to impose conditions and to carry out what it thinks is the right thing to do in the case.

"So, the motion to stay proceedings is denied.

"MR. MAHONEY: Your Honor.

"HON. CLIFFORD O'SULLIVAN: Yes, Mr. Mahoney.

"MR. MAHONEY: Could we have a stay until we can get before Justice Stewart?

"HON. CLIFFORD O'SULLIVAN: Mr. Mahoney, I think not. The motion for a stay is denied. If you

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get to Justice Potter Stewart within the time you anticipate, and if he thinks a stay should be granted, I am quite confident that his stay order can be such as to protect everybody."

It is to be noted that Judge O'Sullivan at no time stated that he thought the lower court had erred in issuing the temporary restraining order originally or that the findings regarding irreparable damage and the impossibility of the restoration of the status quo were not fully supported by the evidence.

Neither Judge O'Sullivan nor Judge Levin were present at the hearing which resulted in the issuance of the temporary restraining order and would not accept the transcript of that hearing as evidence at the hearing on the merits.² Whether they had read the transcript of the hearing on the temporary restraining order and felt the Judge who issued the order had erred (v. which they did not say) or whether they were convinced that plaintiffs had no merit whatever to their case is unknown. All that is known regarding the views of that court on this matter is contained in the above-quoted remarks of Judge O'Sullivan.

Judge O'Sullivan states that should the restraining order be lifted and plaintiffs ultimately prevail the courts and administrative agencies would have the power and resourcefulness to "provide protection of all persons here represented by plaintiffs." It is not denied that those tribunals could provide some type of protection but they certainly could not provide the type of protection to which the employees would be entitled by statute—they could not re-

²The transcript of that hearing is not attached and can be made available on 30-minute notice and the witness who testified at the October 12, 1960, hearing can also be made available to testify.

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create jobs which had been abolished and re-employ all persons who might be entitled to re-employment; they could not reverse the so-called "bumping" process involved in the exercise by employees of their seniority rights and re-move employees as a result; they could not reinstate the fringe benefits which would be lost to those deprived of employment or the annuity rights of those whose accounts had been transferred to Social Security; they could not in any practical sense, "unscramble the egg."

Judge O'Sullivan errs in two respects when he says that the National Labor Relations Board has "unscrambled" such problems many times. First, the NLRB has never been faced with a similar problem because no labor act under which it operates contains provisions remotely similar to those found in Section 5(2)(f) and therefore it has never had to recreate abolished jobs, reverse "bumping" processes and reinstate lost statutory benefits. Second, the NLRB is concerned primarily with industries concentrated at one point and does not become involved in the complexities attendant to the exercise of seniority rights resulting in the transfer and re-transfer of employees halfway across the country.

Therefore, on the one hand, the employees of the railroad will be irreparably damaged and deprived of their right of Supreme Court review of their cause if the temporary restraining order is lifted while, on the other hand, if its provisions remain in effect the United States and the Commission, the primary defendants in this case, can not be harmed in any way and the intervening defendant Erie-Lackawanna Railroad Company merely would be required to postpone for a short time some of the economic benefits of the merger.

The Erie-Lackawanna originally claimed that a postponement of the effective date of the merger would cost it

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\$37,000 a day. This calculation apparently was based upon Appendix D, page 7 of Exhibit H-48, known as the "Wyer Report", wherein it was estimated that at the end of the *fifth* year following ICC approval of the merger and thereafter, the merged company would save \$13,542,038 per year. On the same page, however, the Exhibit clearly demonstrates that during the *first* year following the Commission's order of approval the merged company would save but \$1,268,189. However, even this cost was lessened by the fact that the temporary restraining order entered in this case did not prevent the merger of the railroads in any respect save the abolishment and transfer of jobs. Study XVI of Exhibit H-48 discloses that the Erie-Lackawanna intends to abolish 403 jobs and transfer 430 jobs throughout the entire first year following Commission approval of the merger. This represents approximately 20 percent of the total jobs to be abolished and transferred during the five years following Commission approval of the merger. None of the savings realized through economies other than those to be effected at the expense of the employees are prevented by continuation of the temporary restraining order.

In the last analysis the savings to be realized by job abolishments and job transfers are not lost but are deferred. On the other hand, the harm done to employees by dissolution of the temporary restraining order is permanent and irreparable.

Finally, the defendants, at least theoretically, are required by the provisions of the so-called New Orleans conditions to keep financially whole all employees deprived of employment, displaced or required to move as a result of the merger. Therefore, the savings of moneys to the railroad as a result of dismissing, displacing or transferring

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employees must nearly equal any moneys which the railroad could save by taking such action and, as pointed out above, the latter course while involving relatively minor savings to the railroad would cause irreparable injury to the employees.

VI

REQUEST FOR ORAL ARGUMENT

Oral argument on the foregoing application is respectfully requested.

CONCLUSION

In view of the foregoing it is respectfully submitted that a reinstatement and continuation of the temporary restraining order is an absolute necessity to the consideration of this case by this Court and because of that fact and the irreparable damage which will occur to employees represented by plaintiffs if the status quo is not continued the temporary restraining order should be reinstated and continued until this Court has an opportunity to pass upon the vitally serious question presented by this case.

It is respectfully submitted that the following quotation from the opinion of the United States District Court for the Southern District of New York in *Farr & Company, et al. v. The S. S. Panto Alice, et al.*, 144 F. Supp. 839 (1956) is most applicable here (144 F. Supp. at 841):

"In view of the fact that a serious question of law is involved, that the respondent has appealed the determination of this Court, and that to refuse to grant the stay requested would compel the respondent to enter into a proceeding which conceiv-

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ably could make the appeal moot, this court believes that the relief sought by the respondent in aid of its appeal should be granted in order to preserve the status-quo of the parties.

"The provisions of the orders of this court appealed from by respondent's notice of appeal dated June 28, 1956 should be and hereby are stayed until such time as the United States Court of Appeals for the Second Circuit dismisses or determines the appeal."

Respectfully submitted,

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January 10, 1961

APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
UNDOCKETED, OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES and RAILWAY LABOR EX-
ECUTIVES ASSOCIATION,

Appellants,

—against—

UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION and
ERIE-LACKAWANNA RAILROAD COM-
PANY,

Appellees.

No.

**MEMORANDUM OF APPELLEE ERIE-LACKAWANNA
RAILROAD COMPANY IN OPPOSITION TO MOTION
FOR STAY**

Before the Honorable Potter Stewart, Associate Justice
and Circuit Justice for the Sixth Circuit:

In this appeal, appellants* will seek reversal of the unani-
mous affirmance by the three-judge statutory court** of
the unanimous decision of the Interstate Commerce Com-
mission (Commission).

*While appellants have not yet docketed their appeal, the termi-
nology of appellants and appellees is used in this memorandum.

**The United States District Court for the Eastern District of
Michigan heard the proceedings below as a three-judge court con-
vened pursuant to 28 U. S. C. § 2321 *et seq.*, and was composed of
Clifford O'Sullivan, Circuit Judge, Theodore Levin, Chief Judge,
and Thomas P. Thornton, District Judge.

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Appellants' Motion for Stay requests that a temporary restraining order (entered after a preliminary hearing by Judge Thomas P. Thornton and vacated by the three-judge court after decision on the merits) be revived and continued in effect for the extended period before decision of this appeal.

A brief review of the proceedings is in order, to indicate both the nature of the case and the extravagant nature of appellants' request in the Motion for Stay.

STATEMENT OF THE CASE

Appellants initiated this action on October 7, 1960 and requested, as preliminary relief, that the merger of The Delaware, Lackawanna & Western Railroad Company (Lackawanna) into the Erie Railroad Company (Erie) be enjoined. This merger was scheduled for consummation on October 17th pursuant to Commission Order duly entered September 13, 1960.

At a hearing on October 12th, District Judge Thomas P. Thornton permitted the merger to proceed but entered, under date of October 14th, a temporary restraining order to preserve the employment status quo pending early hearing and disposition of the case on the merits.

The sole legal question involved in this case is appellants' contention that Section 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), "requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time to his service with the railroad carrier not

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to exceed four years." (See Page 2 of the copy of the District Court's Opinion, attached as Appendix A).

Appellants' contention had been flatly rejected by the Commission, their Opinion stating:

"Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers". (Sheets 17-18)

After being fully briefed, and argued at the hearing held November 15th, appellants' contention was again flatly rejected by the statutory court in opinion filed December 7, 1960 which held:

"A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy partially through the reduction of personnel."

In so holding the District Court followed the Commission's consistent interpretation of the statute since its enactment in 1940, an interpretation, moreover, in which the appellant unions have concurred until their present belated challenge.

On December 8th, appellants sought a stay of the lower court's order; and, after two hearings on such motion (December 8th and December 19th), the court on December 19th entered two orders, one dismissing the complaint

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and vacating the temporary restraining order and the other denying any stay pending appeal.

Appellants now ask that a stay in the form of the temporary restraining order (which produced chaos on the merged railroad during the brief period it was in force*) be revived for an extended period of a year or more.** The form of injunction proposed would seem to provide an interim solution through agreement between the parties. However, with one minor exception, the railway brotherhoods refused to enter into any agreements permitting transfers while the temporary restraining order was in effect, resulting in a job freeze. No different behavior can be expected if an extended stay is granted. Indeed, in the absence of the guide lines found in the New Orleans Conditions there is no discoverable basis for such agreements as any stay might contemplate. Appellants contend on this appeal that the employee protective conditions developed over the last 25 years by railway labor and management and by the Commission are now completely unacceptable. Any stay, then, would leave the merged company with no alternative but to attempt to bargain in a vacuum with each of the 20 brotherhoods of the RLEA which represent its employees.

Moreover, in connection with this broad request, appellants offer no bond.

*See Affidavit of Garret C. White, attached hereto as Appendix B.

**It should be noted that the proposed relief goes beyond the ultimate relief appellants seek. As noted above, appellants' contention on the merits is that Section 5(2)(f) requires that employees be retained in an active employment status. The temporary restraining order, however, (designed for a brief period) also required that the Erie-Lackawanna not "abolish the position of" any employee or "transfer his place of employment" unless such transfer was pursuant to agreement with the appropriate collective bargaining representative.

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ARGUMENT

The narrow function of this Court in reviewing the three-judge court's decision to refuse a stay is limited to a determination "whether the discretion of the Court below has been abused." *Alabama v. United States*, 279 U. S. 229, 231 (1929); and see also *Cumberland Tel. Co. v. Louisiana Pub. Serv. Comm.*, 260 U. S. 212, 219 (1922). The area of determination is even more circumscribed when, as here, the three-judge District Court has denied a stay pending appeal and the application for a stay is presented to a single Justice of this Court. For, as stated by Mr. Justice Harlan in a chambers opinion on an application for stay in *Breswick & Co. v. United States*, 75 Sup. Ct. 912, 915 (1955):

"It goes without saying that a single Justice's stay powers in a case such as this should be exercised most sparingly, both in fairness to the prevailing parties below and out of deference to the Court. A single Justice may also be expected to give due regard to a lower court's denial of a stay."

See also *United States ex rel. Knauff v. McGrath*, October Term 1949 (opinion of Mr. Justice Jackson, printed at 96 Cong. Rec. A3751).

The court below did not abuse its discretion. Rather, its denial of a stay followed the principles established by this Court to govern cases involving the public interest. *Virginian Railway Co. v. United States*, 272 U. S. 658, 668-75 (1926); *Yakus v. United States*, 321 U. S. 414, 439-42 (1944).

In the *Virginian* case, Mr. Justice Brandeis, speaking for the unanimous Court in vacating a stay of an Inter-

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state Commerce Commission order granted by a three-judge court, held as follows, 272 U. S. at 672-73:

“Seventh. The Government contends that, even if the District Court had power to say (sic) the order of the Commission pending the appeal in this Court, its action was not warranted by the facts. A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. In *re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case. An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.

“In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived

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them, and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order; it must appear either that the district court entertains a serious doubt as to the correctness of its own decision, or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits, or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

Justice Brandeis' statement of the law is so clear and so clearly pertinent that extended elaboration is unnecessary.

Briefly, then, the *Virginian* and *Yakus* cases completely dispose of the present application, as follows:

1. The overriding public interest is amply demonstrated in this case by the findings and conclusions of the Commission and the Court below, and the affidavit of Garret C. White.* Accordingly, even if appellants could conclusively establish irreparable injury they would not be entitled to a stay.

2. To the extent that irreparable injury to a private party can ever be relevant when the public interest is involved, there are two reasons why appellants' claim of irreparable injury fails:

- (a) In the first place, appellants' showing is wholly insufficient. They rely simply upon the finding of irrepar-

*Some of the bizarre effects which Erie-Lackawanna has experienced under the dissolved temporary restraining order, and which would continue if the present application is granted, are detailed at pages 3-4 of the White Affidavit. The serious financial consequences are stated at pages 5-6.

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able injury made in the temporary restraining order issued by a single judge prior to the impaneling of the three-judge court. This reliance is wholly misplaced because, as held in the *Virginian* case, 272 U. S. at 673:

"An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances *essentially different* from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown." (Emphasis supplied.)

Recognizing the different tests governing the issuance of temporary restraining orders before hearing and stays pending appeal, the three-judge court found the irreparable harm testimony supporting the temporary restraining order not controlling for the purpose of a stay pending appeal. The temporary restraining order, therefore, offers no support for the present application, and the stay must be refused because appellants have not met the *Virginian* command that "additional facts must be shown".

(b) Second, the evidence submitted in support of the request for a temporary restraining order, being in the nature of predictions prior to the merger, was necessarily

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conjectural and speculative. In sharp contrast is the actual experience suffered by Erie-Lackawanna under the temporary restraining order as set forth in the White Affidavit. If the equities are to be weighed at all, it is submitted that the facts show that the balance is clearly with Erie-Lackawanna, for, as the White Affidavit establishes, the result of a stay will be financial catastrophe for the Erie-Lackawanna. Moreover, a stay would have an immediate impact upon the general railroad work force, for the continuance of financial difficulties would require the furloughing of many employees (indeed, several times the number affected by merger) with no compensatory benefits other than those offered by the unemployment compensation laws.

3. The three-judge court below entertained no doubt as to the correctness of its own decision and there is no conflict among the Circuits on this subject.* Indeed, appellants' contention in this case was debated and rejected by Congress when the present Section 5(2)(f) was enacted in 1940 and lay dormant for 20 years while the Commission with the acquiescence of railway labor developed the pattern of compensatory benefits in over 80 proceedings under Section 5(2)(f).

4. An appeal bond could not indemnify Erie-Lackawanna fully and there is no way to indemnify the public. As noted, appellants here have not even offered a bond.

*Appellants do claim that two opinions of this Court, *Railway Labor Executives Ass'n. v. United States*, 339 U. S. 142 (1950), and *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U. S. 330 (1960), are involved, but the court below deemed both cases to be inapposite to appellants' contention. See pp. 6 and 7 of the opinion.

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In an effort to find some special reason why the Commission's order should not become operative, appellants assert that, in the absence of a stay, the case on the merits may become moot. As a matter of fact the economies and improvements which the Erie-Lackawanna hopes to achieve will not be accomplished entirely for a period of five years. Accordingly, many employees will not even begin to feel the impact of the merger until the end of that five year period.

There can therefore be no serious contention that a possibility of mootness exists here.*

*Even if it were conceivable that the case might become technically moot during the pendency of the appeal, that would not necessarily defeat the jurisdiction of this Court. For, jurisdiction has been retained, despite claims of mootness, in cases where the act against which relief is sought may have a continuing effect, or where a question of public importance is involved, or where the case involves interpretation of a statute or regulation which may provide a useful guide for future administrative action. *Southern Pacific Terminal v. ICC*, 219 U. S. 498, 515 (1911); *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *Gay Union Corporation v. Wallace*, 112 F. 2d 192, 195 (D. C. Cir., 1940); *Waling v. Haile Gold Mines*, 136 F. 2d 102, 105-06 (4 Cir., 1943). Also, as this Court has stated, a party to an injunction proceeding cannot moot it by completing the acts sought to be enjoined. *Texas & New Orleans Railroad v. Northside Belt Railway*, 276 U. S. 475, 479 (1928); *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 15-16 (1936).

There is, therefore, no basis for contending that this case will become either factually or legally moot during the pendency of the appeal. The mootness contention of appellants is really the assertion in another form of their irreparable injury argument. The fact that some employees may be discharged or transferred, if a stay is not granted, will not produce mootness. At most, it will produce only individual hardship to those employees, the extent of which is questionable in view of the compensatory New Orleans Conditions imposed in the order approving the merger. But, for the reasons previously stated, the possibility, or even the actuality, that such individual hardship may result, is no reason for granting a stay in a case of this kind involving the public interest.

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CONCLUSION

For the above stated reasons, the motion should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

UNDOCKETED, OCTOBER TERM. 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES and RAILWAY LABOR EXEC-
UTIVES ASSOCIATION,

Appellants,

—against—

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION and ERIE-
LACKAWANNA RAILROAD COMPANY,

Appellees.

No.

Affidavit of Garret C. White

STATE OF OHIO
COUNTY OF CUYAHOGA, } ss.:

GARRET C. WHITE, being duly sworn, deposes and says:

1. I am Vice President—Operations of Erie-Lackawanna Railroad Company (Erie-Lackawanna). I am familiar with and actively participated in the proceeding involving the Erie Railroad Company (Erie) and The Delaware, Lackawanna & Western Railroad Company's (Lackawanna) joint application to the Interstate Commerce Commission (Commission) for permission to merge Lackawanna into Erie. I am also familiar with the proceedings brought by appellants before a three judge court in the Eastern District of Michigan, Southern Division, and with appellants' present application for a stay. I make

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this affidavit in opposition to that application by appellants. If the application is granted, I am convinced that the result would be to cripple and perhaps to destroy the Erie-Lackawanna.

2. I have held my present position as Vice President—Operations of Erie Lackawanna since October 17, 1960. Prior to that date I was Vice President—Operations of Erie, having served in that capacity since 1956. I have been continuously employed by the Erie since 1925 and I have held a series of positions during that period. As Assistant Vice President from 1951 to 1956, I was responsible for all negotiations in behalf of Erie with labor organizations. Since 1956 the officer in charge of such negotiations has reported directly to me. Moreover, since 1951, I have continuously served as a member of the Eastern Carriers Conference Committees and as a member of the Section 13 Committee, under the Washington Job Protection Agreement of May, 1936. I have therefore been continuously concerned with the many labor problems confronting the railroad industry and particularly with those problems presented in this case.

3. Appellants represent the vast majority of Erie-Lackawanna's employees. In the court below and before the Commission, appellants contended that the Commission was required by law to provide that all employees affected by the merger of Lackawanna into Erie must be retained in an active employment status for four years. The court below and the Commission unanimously rejected that contention and the court below also denied plaintiff's motion for a stay or injunction pending appeal.

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4. By the present motion for a stay, appellants seek to reinstate the temporary restraining order entered by a single judge below on October 14, 1960, and vacated by the unanimous court below on December 19, 1960. Appellants thus ask this Court to impose terms which would not only require Erie-Lackawanna to retain all employees in an active employment status, but also would prevent Erie-Lackawanna from transferring, or abolishing the position of, any employee.

5. Under the terms of the stay sought by appellants, as was the case under the temporary restraining order, Erie-Lackawanna would be almost entirely prevented from consolidating the separate operations of the Erie and Lackawanna. Technically, the Erie-Lackawanna merger was accomplished on October 17, 1960. However, we have been forced to continue to duplicate nearly every operation and function. Moreover, many such costly duplications are conducted in widely separated locations which increases the confusion.

Some examples of the duplications are the maintenance of two separate revenue accounting departments—one in Cleveland, Ohio, and one in Scranton, Pennsylvania; the maintenance of two disbursement accounting departments—one in Hornell, New York, and one in Scranton, Pennsylvania; the duplication of car-tracing procedures—requiring diversion messages to be sent to both Cleveland, Ohio, and Scranton, Pennsylvania; duplication of telephone switchboards (at an annual extra cost for rental of an additional switchboard in the New York area alone of \$16,000.00)—requiring calls to be placed through separate switchboards even though calls are made to the same departmental offices at the same general location; duplication and repeated han-

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ding of cars in interchange between adjoining yards of the merged company in the same location; duplication of road trains operating between the same terminals and over identical tracks between Binghamton and Corning, N. Y., a distance of 76 miles.

Many of these duplicated operations and functions in fact result in increased costs to the merged railroad over and above the costs which would have been incurred if the two constituent railroads had continued to operate independently. Elimination of all of this duplication is, as the Commission found, in the public interest. Indeed, Erie-Lackawanna must be permitted to effect these savings or its service to the public and its very existence will be imperiled.

6. The injunction sought by appellants contains a provision purportedly permitting consolidation of functions to be achieved pursuant to "the terms of an interim and/or implementing agreement with the appropriate collective bargaining representative." Under the temporary restraining order issued below we negotiated extensively with all of the unions in an attempt to work out such agreements. However, with one very minor exception, we were unable to do so. My subordinates have been repeatedly informed by bargaining representatives of the various unions that they had been instructed not to sign any such agreements while a restraining order is in effect.

7. It is doubtful that Erie-Lackawanna could avoid bankruptcy should the Court grant the injunction requested by appellants, because such an injunction would, as in the case of the temporary restraining order of October 14, 1960, prevent it from effecting the economies and eliminating the

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duplications of facilities and operations contemplated by the Commission's order. For the first ten months of 1960 the Erie and the Lackawanna suffered a combined net deficit of \$13,753,000. That compares with a net deficit for the two companies for the same period in 1959 of \$8,931,000, or an increase in net deficit of \$4,822,000. In November, 1959, the two companies had a combined net deficit of \$1,230,000. In November, 1960, the merged company had a net deficit of \$2,375,913 for the month. Accordingly, the net deficit for the first eleven months of 1960 is \$16,129,174 as compared with \$10,161,173 for the same period in 1959. On December 31, 1959, the current assets of the Erie and Lackawanna (exclusive of material and supplies) exceeded current liabilities by \$10,572,000. On November 30, 1960, that figure had declined to \$2,385,989, or a decrease of \$8,186,011, in the eleven-month period. This figure gains significance when it is realized that the monthly payroll of Erie-Lackawanna is approximately \$10,000,000. Losses would have been substantially greater if the Erie and the Lackawanna had been conducting a normal maintenance program with respect to roadway, rolling stock and other physical facilities. Since 1957 both the Erie and the Lackawanna have been forced to defer normal maintenance. Such deferral cannot long continue without affecting efficient and competitive service. Indeed this problem is so serious that within the last few weeks Erie-Lackawanna, being unable to provide therefor out of normal revenues, had to borrow \$1,600,000 just to make essential repairs on cars.

It is expected that, if the merged company is able to consolidate all its functions, financial calamity can be avoided. The studies upon the basis of which the merger of Erie and Lackawanna was proposed to the Commission estimated that the merging of the two companies would

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eventually result in savings of \$13,500,000 a year. That would mean that once the merger is fully consummated Erie-Lackawanna can expect to save \$37,000 per day. It was estimated that it would take five years from the date of the merger for the ultimate savings to be realized. However, that estimate was based upon an assumption that Erie-Lackawanna would immediately be able to consolidate functions and operations. An insignificant amount of consolidation has taken place at the management level, but until complete consolidation can be achieved the savings eventually to be realized are being further postponed. Thus, every single day that consolidation is postponed Erie-Lackawanna is losing nearly all of that \$37,000 per day. Appellants refuse to bond any portion of that loss or of any of the other losses Erie-Lackawanna would suffer as a result of an injunction.

In the light of all of the facts stated above, it is plain that the probable effect of an injunction would be to force Erie-Lackawanna into bankruptcy.

/s/ GARRET C. WHITE
Garret C. White

Sworn to before me this }
9th day of January, 1961. }

/s/ THOMAS D. CAINE
Thomas D. Caine, Notary Public
State of Ohio

[NOTARIAL SEAL]

My Commission Expires Aug. 26, 1962

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES
UNDOCKETED, OCTOBER TERM 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES and RAILWAY LABOR EX-
ECUTIVES ASSOCIATION,

Appellants,

—against—

UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION and
ERIE-LACKAWANNA RAILROAD COM-
PANY,

Appellees.

No.

**SUPPLEMENTAL STATEMENT OF APPELLEE ERIE-
LACKAWANNA OPPOSING MOTION FOR STAY**

The memorandum of appellee Erie-Lackawanna opposing the stay demonstrates that appellants have not made a sufficient showing under *Virginian Railway Co. v. United States*, 272 U. S. 658 (1926), to justify granting a stay and that, if the equities are to be weighed at all, the balance is in favor of Erie-Lackawanna. However, since the only claims of possible harm made by appellants are of relatively minor consequence in the total picture, Erie-Lackawanna is willing to give certain assurances pending disposition of this appeal which, it is submitted, eliminate any justification for a stay.

Appellants' only claims of financial harm are based on the findings of Judge Thornton made on the application for temporary restraining order prior to the decision of the three-judge court dismissing the complaint. (Pp. 6-7 of

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appellant's application). Those alleged claims of harm are as follows:

(1) that annuity rights under the Railroad Retirement Act would be jeopardized;

(2) that fringe benefits would become inoperative;

(3) that, under the New Orleans Conditions imposed by the Commission, Erie-Lackawanna is obligated only to pay for one move of an employee and, if he were required to move his residence a second time, the employee would have to bear the burden of such move.

The only other adverse result which appellants urge will follow if a stay is not granted is the possible personal inconvenience which may be occasioned to employees who may be bumped, furloughed or required to change their residence by reason of the merger, but the New Orleans Conditions make them financially whole and such personal inconvenience is certainly not the kind of harm justifying a stay.

In order to eliminate these possible sources of minor financial harm which appellants fear, and to minimize the personal inconvenience which they assert may otherwise result, we are authorized to make the following assurances on behalf of Erie-Lackawanna. Such assurances will be observed during the pendency of this appeal and are on condition that there be no stay and that appellants cooperate with appellees to make every effort to expedite this appeal to the end that it be determined during the present Term.

1. Paragraph 6 of the Oklahoma Conditions, which is a part of the New Orleans Conditions, provides as follows:

"6. No employee affected by the transaction approved herein shall be deprived during the protective

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period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained."

Erie-Lackawanna will comply with the requirements of such Paragraph and, in accordance therewith and the Railroad Retirement Act, Erie-Lackawanna will make the appropriate company contributions to the Railroad Retirement Fund with respect to any employee furloughed as a result of the merger.

2. In addition to benefits due under the above quoted Paragraph 6 of the Oklahoma Conditions, Erie-Lackawanna will pay to each employee furloughed by reason of the merger who at the time is covered by company maintained hospital insurance an amount equal to the monthly premium cost to such covered employee* of maintaining his benefits under the comparable Travelers Insurance Company Policy GA-23111 which has been in operation for some time for the benefit of furloughed employees.

3. If any employee is required to move his place of residence more than once as a result of the merger, Erie-

*"Covered employees" are non-operating employees who receive hospitalization insurance. Operating employees elected to receive an increase in pay in lieu thereof and such affected employees would, of course, have that increase reflected in salary payments under the New Orleans Conditions.

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Lackawanna will pay the benefits with respect to any such move, just as in the case of the first move as provided for under the New Orleans Conditions.

4. In carrying out the merger and in effecting the elimination of duplicate operations and facilities which the merger was designed to accomplish, Erie-Lackawanna will do everything in its power to minimize the so-called bumping of, inconvenience to and dislocation of its employees, consistent with orderly implementation of the merger and the public interest to be served thereby.

5. Specifically to that end, and consistent with the foregoing, Erie-Lackawanna will endeavor to minimize the transfers of employees requiring a change of residence. Erie-Lackawanna has a strong incentive in that respect since it will cost substantial amounts to compensate employees for such transfers.

The assurances herein extend to each employee of the Erie-Lackawanna who had an active employment status with the Erie Railroad Company or The Delaware, Lackawanna & Western Railroad Company on October 12, 1960, and who is represented by a union whose chief executive officer is a member of the Railway Labor Executives Association, and any such employee shall be entitled to the benefits of such assurances during the pendency of this appeal, but no longer than the maximum period of his entitlement under Section 5(2)(f) of the Interstate Commerce Act.

In the light of these assurances, there can be no justification for the stay which appellants seek. That stay must be denied to avoid the serious financial consequences which would otherwise result to Erie-Lackawanna and the harm

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which that would cause to the public interest and the national transportation policy.

Respectfully submitted,

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/s/ JOHN H. PICKERING
John H. Pickering
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Of Counsel.

APPENDIX E

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES and RAILWAY LABOR EXEC-
UTIVES' ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, and ERIE-
LACKAWANNA RAILROAD COMPANY

**MEMORANDUM FOR THE UNITED STATES AND THE
INTERSTATE COMMERCE COMMISSION IN OPPOSI-
TION TO MOTION FOR STAY**

1. Whether a stay pending appeal is warranted in the circumstances shown by the moving papers depends on a balancing of the equities, specifically in relation to the extent of the irreparable injury which would result if a stay were granted or denied. On that basic question, which is addressed to the exercise of sound judicial discretion, we think it is manifest that in this situation some degree of irreparable injury is unavoidable whichever disposition is made of the motion for stay. On the one hand, it is clear that any postponement of the consolidation, insofar as it would achieve elimination of overlapping and uneconomical facilities and jobs, would necessarily result in loss to the

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railroad and thus further impair its present precarious financial situation. On the other hand, dismissals, demotions, or transfers of employees during the pendency of the appeal, even though the affected employees are given financial protection under the "New Orleans conditions" included in the Commission's order, would necessarily result in intangible but nonetheless very real injury. Dislocation of families, uprooting them from the communities in which they live, with all the attendant personal hardships and inconveniences, cannot be disregarded in determining "irreparable injury." The basic command of the statute, as this Court emphasized in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, is that "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected" (49 U. S. C. 5(2)(f)). In its supplemental memorandum of this date, the railroad recognizes its obligation to prevent hardship to its employees if it can be avoided consistently with the ultimate objectives of the merger. It has given formal and specific assurances in this regard. Accordingly, in view of these assurances, and especially since there is no challenge to the Commission's determination that consummation of the merger would be in the public interest, the United States believes that, on a balancing of the equities, the stay should be denied.

2. If a stay is denied, however, it is certainly in the public interest, and in the interest of the private parties, that the issue involved on this appeal be resolved promptly and without unnecessary delay. The proceedings in the District Court were fully disposed of within less than three months from filing of the complaint. To the extent that any employees would be adversely affected by actions taken.

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while the appeal is pending, to implement the plan of consolidation, it is surely in the interest of appellants to expedite the Court's consideration and disposition of the appeal. There appears to be no reason why appellants should not be able to docket the case and file their jurisdictional statement by February 1. This would permit the filing of prompt motions to affirm, and perhaps enable the Court to determine at its February session whether probable jurisdiction should be noted or the motions to affirm be granted. If the former disposition is made, the parties should be able to agree on an accelerated briefing schedule which would allow the case to be heard and decided at the present Term. So far as the Government is concerned, it will cooperate fully to that end.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JANUARY 12, 1961.

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
UNDOCKETED, OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES and RAILWAY LABOR EXEC-
UTIVES' ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, and ERIE-
LACKAWANNA RAILROAD COMPANY,

Appellees.

ON APPEAL FROM THE DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

REPLY OF APPELLANTS TO SUPPLEMENTAL STATE-
MENT OF APPELLEE ERIE-LACKAWANNA AND MEMO-
RANDUM IN OPPOSITION TO MOTION FOR STAY OF THE
UNITED STATES AND THE INTERSTATE COMMERCE
COMMISSION

To the Honorable Potter Stewart, Associate Justice of the
Supreme Court of the United States:

The appellants respectfully request permission to file
this reply to the Memorandum of the United States and the
Interstate Commerce Commission (hereinafter referred to
as the "Government") and the Supplemental Statement of
appellee Erie-Lackawanna in view of the fact that the Sup-

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plemental Statement sets forth certain "assurances" which are presented for consideration for the first time and upon which the Government heavily relies in opposing the Motion for Stay.

This reply will first consider the Government's Memorandum and then take up the "assurances" set forth in the Supplemental Statement of the railroad.

1. *Memorandum for the Government.* The Government's Memorandum admits that the instant proceeding presents to this Court a serious and substantial question of law. There is no intimation that the issue presented is frivolous and the Government states that "it is certainly in the public interest . . . that the issue involved in this appeal be resolved promptly and without unnecessary delay."

The Government also admits that the effect of a dissolution of the temporary restraining order pending this appeal "would necessarily result in intangible but nonetheless very real injury" to employees and their families. While the Government agrees that the intangible injury about which it speaks "can not be disregarded in determining 'irreparable injury' " it avoids mentioning the primary irreparable injury which would be suffered by employees; namely, the dislocation of employees caused by the bumping process attendant to the exercise of seniority rights upon the abolishment of jobs. As pointed out in our Motion for Stay (pp. 6-7) the lower court specifically found that it would be impossible "to place the man back in status quo in the event that they were dislocated by virtue of the merger."

With regard to the effect which the continuation of the temporary restraining order would have upon the railroad, the Government states that it would "necessarily result in loss to the railroad and thus further impair their present pre-

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carious financial situation." It is significant, however, that the Government makes no claim that the grant of a stay in this case would constitute a threat of bankruptcy nor does it deny appellants' contention that the "loss" to the railroad is in fact a mere delay in securing some of the financial benefits of the merger.

The Government argues that the railroad recognizes in its Supplemental Statement that there is an obligation to prevent hardship to employees "if it can be avoided consistent with the ultimate objectives of the merger." Obviously, this obligation is present in all cases and appellants have trusted that the railroad would live up to this obligation to the best of its ability but it is that hardship which can not be avoided "consistent with the ultimate objectives of a merger" that appellants seek to prevent pending their appeal in this case.

The Government relies upon certain "assurances" set forth in the railroad's Supplemental Statement and concludes that the stay should be denied because of these assurances; because there is no challenge to the Commission's determination that the merger would be in the public interest and because the Government believes that, granted the existence of the "assurances", a balancing of the equities favors denial.

The appellants have never challenged the Commission's determination that the merger would be in the public interest and, in fact, have never tried to enjoin the merger. Appellants have always and only attempted to prevent the irreparable injury to the employees they represent pending a determination of the serious question of law presented here. Appellants have only tried to stay that injury and the Government clearly admits that if the restraining order is not continued that injury will take place.

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The Government does not challenge the contention that a denial of a temporary restraining order would deprive appellants of their right of appeal. In view of this fact and in view of the relative harm to the parties in this case it is respectfully submitted that the balancing of the equities indicates that the stay should be granted. This is particularly true since, as will be shown below, the "assurances" do not protect the employees against irreparable injury.

Finally, the Government states that if the stay is *denied* the appellants should file their jurisdictional statement by February 1 and if probable jurisdiction is noted the parties should agree on an accelerated briefing schedule which would allow the case to be heard and decided during the present Term. This position of the Government apparently supports appellants' position that a denial of a stay in this case will moot the issue presented unless it is resolved by this Court immediately.

If denial of a stay would not deprive appellants of their right of appeal, the Government's position is one which is patently unfair to appellants as it would place stringent time limitations upon them for no valid reason.

Appellants have always done all in their power to expedite this proceeding as is evident from the expeditious handling of this case in the lower court. The appellants, in fact, would readily agree to the filing of a jurisdictional statement by February 1, 1961, as a condition for the issuance of a stay in this case. Appellants would also agree to any other dates which this Court might see fit to set if the Court felt that its calendar permitted argument and decision during this Term, however, appellants will not presume to base any agreement upon a condition that this Court hear and decide this case during this Term.

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2. *Supplemental Statement of Erie-Lackawanna.* The Supplemental Statement of the railroad begins with a citation of *Virginian Railway Co. v. United States*, 272 U. S. 658 (1926), and a claim that appellants have not made a sufficient showing under the holding in that case to justify the granting of a stay here.

It is respectfully submitted that the *Virginian* case supports appellants' request for stay. That case specifically provided that the granting of a stay sustaining the Commission's order may be justified if a "special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court." (272 U. S. at 673.) This case, of course, involves such special reason, namely, the loss of appellants' right of appeal if the stay is not granted.

In addition, unlike this case, the *Virginian* case involved a situation wherein the lower court issued no opinion, either written or oral, which was interpreted by this Court "as tantamount to a declaration that upon careful scrutiny of the record the questions presented for judicial determination appeared to be simple; or, at all events, that the case did not involve the determination of any question of law which was novel or as to which there was, or could be, reasonable doubt."¹ (272 U. S. at 674.)

In its Supplemental Statement the railroad also contends that "the only claims of possible harm made by appellants are of relatively minor consequence in the total picture." This contention is directly contradictory of the

¹At the conclusion of the hearing on the temporary restraining order the lower court informed the parties that if they would submit their briefs one week prior to the date set for the hearing on the merits, the court would issue its decision within one week thereafter. However, the court did not issue its decision for three weeks.

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oral and written findings of the lower court set forth at pp. 6 and 7 of appellants' Motion for Stay, as well as the recognition by the Government of the "very real injury" which will occur to employees and their families.

The railroad attempts to relegate the irreparable injury which would be suffered by its employees to claims of financial harm. This, again, is directly contradictory of the oral and written findings of the lower court as set forth in appellants' Motion for Stay and the conclusions of the Government as set forth in its Memorandum.

The railroad then attempts to picture the effect of the bumping process as a "possible" personal inconvenience" and indicates that the so-called New Orleans Conditions will make "bumped" employees financially whole.

Appellants correctly submit that the railroad here involves itself in a patent attempt to slough off the most important element of adverse effect which will result to employees if a stay is not issued; namely, the effects of the operation of the bumping process. Protection against this element of adverse effect is not provided for in the New Orleans Conditions and the results to employees can not be measured financially. As the lower court found, the bumping process goes well beyond personal inconvenience and results in loss of employment rights which can not be restored and in an indefinite number of moves which can not be reversed.

In any event, as is pointed out in the Motion for Stay, the New Orleans Conditions do not become operative until implementing agreements are executed and once those agreements are executed this case is rendered moot.

Upon the fallacious premise that the harm resulting to employees as a result of the dissolution of the temporary restraining order is purely financial in character, the rail-

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road lists certain assurances which it will observe on condition that there be no stay and that "appellants cooperate with appellees to make every effort to expedite this appeal to the end that it be determined during the present Term." As heretofore noted, appellants will make no such agreement but they will continue to treat this case in the most expeditious manner possible.

The railroad assures the Court that it will continue to make contributions to the Railroad Retirement Fund with respect to furloughed employees. However, such action will not protect the Railroad Retirement Act benefits of an employee who is forced to take employment in outside industry and become subject to the provisions of the Social Security Act.

The railroad assures the Court that it will pay furloughed employees an amount equal to the monthly premium cost of maintaining hospitalization benefits. The hospitalization benefits available to furloughed employees, however, are inferior to those available to working employees.

The railroad agrees to pay for any move an employee may be required to make as a result of the merger. In addition to the apparent admission that the railroad contemplates individual employees and their families will be required to make several moves as a result of the merger, this type of moving produces the "intangible but nonetheless real injury" which "can not be disregarded in determining 'irreparable injury' " and which can not be cured financially.

The railroad goes on to assure the Court that it will do everything in its power to minimize the bumping process, consistent with the orderly implementation of the merger and will endeavor to minimize the transfer of employees. Obviously, these duties exist whether or not a stay is

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granted. Indeed, appellants assume that the railroad will do what it can to minimize the adverse effect of this merger on its employees and its stockholders but in taking the actions required "consistent with implementation of the merger", the railroad will accomplish the very results which the lower court found would irreparably damage employees and destroy the status quo which is impossible of subsequent restoration.

CONCLUSION

It is respectfully submitted that the Government's Memorandum and the railroad's Supplemental Statement in effect vitiate the claims of impending bankruptcy contained in the railroad's original memorandum and in the affidavit of Garret C. White attached thereto. The Government does not support those claims in its Memorandum and the railroad, in putting forth the "assurances" contained in its Supplemental Statement, casts serious doubt upon those claims.

Appellants believe it extremely significant that the single most important factor supporting appellants' request for stay—the impossible but necessary re-creation of abolished jobs and reversal of the bumping process—is nowhere challenged by appellees.

In any event, no appellee contends that the railroad would suffer irreparable injury if a stay is granted pending this Court's action on a motion to affirm and as noted above, appellants will agree to the conditioning of a stay upon the filing of their jurisdictional statement with this Court by February 1, 1961. Surely, it can not be seriously contended

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appellants are not entitled to a stay until this Court can act on a motion to affirm provided they file their jurisdictional statement by February 1, 1961.

Respectfully submitted,

/s/ JAMES L. HIGHSAW, JR.
James L. Highsaw, Jr.

/s/ WM. G. MAHONEY
William G. Mahoney
620 Tower Building
Washington 5, D. C.
Attorneys for Appellants

January 13, 1961

APPENDIX G

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON 25, D. C.

January 23, 1961

Re: BROTHERHOOD OF MAINTENANCE OF WAY EM-
PLOYES & Ry. LABOR EXEC. ASS'N. v. U. S.,
I. C. C., and ERIE-LACKAWANNA RR Co., No.
....., O. T., 1960:

Dear Sir:

The Court today entered the following order in the above-entitled case:

"An application was made to Mr. Justice Stewart for an order staying the decree of the three-judge district court in this case insofar as it terminated a temporary restraining order previously entered. The application was referred by Mr. Justice Stewart to the Court. In the light of the representations made by appellee, Erie-Lackawanna Railroad Company, the application is denied without prejudice to its renewal upon the prompt docketing of the appeal. The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas would grant the stay."

Very truly yours,

JAMES R. BROWNING, Clerk

By EDWARD C. SCHADE
Assistant

ECS:ht

Ralph L. McAfee, Esq.
15 Broad Street
New York 5, N. Y.

APPENDIX H

IN THE
SUPREME COURT OF THE UNITED STATES
No. 681, OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES and RAILWAY LABOR EXEC-
UTIVES' ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION and ERIE-
LACKAWANNA RAILROAD COMPANY,

Appellees.

ON APPEAL FROM THE DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

RENEWED APPLICATION FOR STAY

To the Honorable Potter Stewart, Associate Justice of the
Supreme Court of the United States:

The appellants, Brotherhood of Maintenance of Way
Employees and Railway Labor Executives' Association,
having under date of January 10, 1961, filed their appli-
cation for an order staying the decree of the three-judge
district court in this case insofar as it terminated a tem-
porary restraining order previously entered by that court
with one judge sitting and this Court having entered an
order on January 23, 1961, denying said application with-

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out prejudice to its renewal upon the prompt docketing of this appeal, the appellants, having docketed their appeal on January 27, 1961, respectfully renew their application for an order staying the effect of the order of the District Court insofar as it terminates the temporary restraining order previously entered by that court pending final disposition of this appeal by this Court.

REASONS FOR REQUESTING STAY

In support of their Renewed Application for Stay appellants rely upon the reasons set forth in their Application for Stay filed with this Court on January 10, 1961, and in their Reply filed with this Court on January 13, 1961, as well as the further reasons contained in their Jurisdictional Statement filed with this Court on January 27, 1961.

In its order of January 23, 1961, this Court stated that it denied without prejudice the appellants' application "in light of the representations made by appellee, Erie-Lackawanna Railroad Company". Appellants respectfully submit that the representations contained in the supplemental statement of Erie-Lackawanna will not prevent the occurrence of those effects which, if not restrained, will render the status quo impossible, of subsequent restoration and thereby will effectively deprive appellants of their statutory right of appeal.

The entire purpose of Section 5(2)(f) is to permit the realization of those merger economies which are made at the expense of employees to be realized through the process of natural attrition. This means that jobs are abolished as they become vacant through death, retirement, resignation or justifiable dismissal for cause. In other words, the savings are to be gained from the *top* of the seniority roster

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without the necessity of employees exercising seniority rights to displace other employees who are junior to them.

Denial of the renewed application for stay would permit the realization of savings at employee expense through the immediate abolishment of jobs. This means that as jobs become vacant they must immediately be filled by those employees with superior seniority rights. In other words, the merger savings are gained from the *bottom* of the seniority roster after all employees have exercised their seniority rights and those with inferior seniority rights find themselves with no jobs on which to bid. The exercise of seniority rights often entails moves by employees from one city to another since the geographic area in which an employee may have seniority rights may extend for many miles.

Once this process of the exercise of seniority rights, or "bumping" as it is called, is carried out the previously existing employment situation cannot be restored. Restoration could be attempted but it would involve the re-creation of jobs, the re-moving of employees, the recall to service of all those who have been deprived of employment and the complete reversal of a merged railroad operation. It is this situation which the District Court primarily referred to when it held that the "status quo would be impossible of subsequent restoration".

The representations and assurances of the Erie-Lackawanna do nothing to protect the employees from being deprived of their right under Section 5(2)(f) to continued comparable employment at comparable pay since no action of the Commission could restore the status quo so as to make the employment protection required by Section 5(2)(f) effective for all employees entitled thereto. If the

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Commission could not formulate effective protective conditions once the status quo is destroyed this Court would have no factual situation before it upon which it could base effective relief. Such a situation would render appellants' case moot and thereby deprive them of their statutory right of appeal.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in appellants' original Application for Stay, their Reply and their Jurisdictional Statement filed this day, appellants respectfully renew their application to this Court to reinstate and continue the temporary restraining order maintaining status quo insofar as the employment on the Erie-Lackwanna is concerned until such time as this Court has an opportunity to pass upon the vitally serious question presented by this case.

Respectfully submitted,

WM. G. MAHONEY

William Grattan Mahoney, Attorney
for Appellants, Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association

Address:

620 Tower Building
Washington 5, D. C.
ST 3-5366

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff-Appellant
and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff-Appellant

v.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,
Defendant-Appellees

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant-Appellee

Appeal from the United States District Court for the
Eastern District of Michigan

**REPLY OF APPELLANTS TO MEMORANDUM OF
APPELLEE ERIE-LACKAWANNA RAILROAD
COMPANY ON THE QUESTION OF THE
JURISDICTION OF THIS COURT**

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GEORGE E. BRAND
GEORGE E. BRAND, JR.
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Detroit 26, Michigan

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff-Appellant

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor Plaintiff-Appellant

v.

**UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,**
Defendant-Appellees

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervenor Defendant-Appellee

Appeal from the United States District Court for the
Eastern District of Michigan

**REPLY OF APPELLANTS TO MEMORANDUM OF
APPELLEE ERIE-LACKAWANNA RAILROAD
COMPANY ON THE QUESTION OF THE
JURISDICTION OF THIS COURT**

On February 3, 1961, the Erie-Lackawanna Railroad Company filed with this Court a memorandum in which it presented three points for the consideration of the Court. It requested this Court to restrict the issues to be considered on appeal; it opposed the renewed

application for stay; and, it waived its rights to file a motion to affirm, but in so doing suggested that this Court might affirm *sua sponte* the lower Court's decision and offers five reasons in support of such suggestion.

Appellants have filed their reply to Erie-Lackawanna's opposition to the renewed application for stay in a separate document addressed to the Honorable Potter Stewart. However, the first and third points presented in the Erie-Lackawanna memorandum are directed to the issue of the jurisdiction of this Court. Lest a failure to reply to those points be regarded as a concession of their accuracy, appellants herewith submit this brief reply to the arguments of Erie-Lackawanna in support of its requests that this Court limit the issues to be considered on this appeal and affirm on its own motion the decision below.

I

THE QUESTIONS PRESENTED IN THE JURISDICTIONAL STATEMENT ARE THE PROPER QUESTIONS TO BE CONSIDERED BY THIS COURT

The Erie-Lackawanna's attempt to restrict the issues in this case is a bit difficult to comprehend since it does not claim that they have no factual basis in the record. Erie-Lackawanna's entire argument is based upon a claim that the primary issue was *phrased* differently below. It seems to appellants that it is solely within the province of each party to phrase the issues as it believes them to be presented by the factual situation and the law. It is then this Court's prerogative to determine whether they are accurately phrased.

The Erie-Lackawanna memorandum at pp. 24,

states that there is but one question presented on this appeal and sets forth that question as follows:

"Whether Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906, 49 U.S.C. § 5(2)(f)) requires the Commission to impose as a minimum, upon every transaction approved under Section 5(2) the requirement that every employee affected by an approved transaction must be retained in an active employment status for a period equal in time with his service to the railroad, not to exceed four years."

The issue as set forth by the Erie-Lackawanna is a paraphrase of the issue as viewed by the court below. It does not properly state the question presented here since it confines the requirements of Section 5(2)(f) to continued "active employment" while the statute itself requires more than mere active employment. The statute clearly states that an employee shall not "be in a worse position with respect to his employment." (Emphasis supplied.)

The primary question presented by this appeal is the first question set forth at page 5 of the jurisdictional statement. The other questions relate to specific errors which appellants contend were made by the Commission, and the District Court in upholding the Commission.

Obviously, the general problem presented to this Court concerns the proper interpretation of Section 5(2)(f) but the issues presented must be related to the manner in which that problem was treated by the District Court and the Commission. The five questions set forth in the jurisdictional statement present that problem in the light of the manner in which it was handled below.

II

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The third point contained in the memorandum of the Erie-Lackawanna (pp. 9-11) is entitled "The Reasons Why Erie-Lackawanna Is Waiving the Filing of a Motion to Affirm." The Erie-Lackawanna specifically states that it waives its right to file such a motion and offers as its only reason for doing so the fact that an ultimate decision on the merits of the case may be delayed if a motion to affirm were filed and this Court noted probable jurisdiction.

Immediately after giving its reason for waiver, the Erie-Lackawanna goes on to state that this Court might affirm *sua sponte* the decision below on the basis of the Commission and District Court opinions and proceeds to list five reasons which it believes supports such action by this Court. The reasons given by Erie-Lackawanna are answered in the jurisdictional statement filed with this Court on January 27, 1961. Therefore, appellants will not burden the Court with further argument at this time but merely will list the five reasons offered by Erie-Lackawanna and refer to the pages of the jurisdictional statement where they are answered.

1. The Erie-Lackawanna claims that the plain language of Section 5(2)(f) does not require continued active employment and cites the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, and the Communications Act of 1943, 57 Stat. 5, as support for this contention. (See Jurisdictional Statement, pp. 22-23.)

2. The Erie-Lackawanna contends that appellants cannot demonstrate that the original language of

the Harrington amendment and the modified language of that amendment as it appears in the present law were intended to provide the same protection. (See Jurisdictional Statement, pp. 18-20, 24.)

3. The Erie-Lackawanna contends that the Commission has "consistently imposed compensatory conditions upon all transactions approved under Section 5(2)" and that the RLEA has concurred in the imposition of such conditions. (See Jurisdictional Statement, pp. 13-16; 21-22.)

4. The Erie-Lackawanna cites this Court's decisions in *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950) and *Order of Railroad Telegraphers v. Chicago and N. W. Ry.*, 362 U.S. 330, 345 (1960) as an indication by this Court that "Section 5(2)(f) does not require complete preservation of employment." (See Jurisdictional Statement, pp. 16-18.)

5. The Erie-Lackawanna contends that "policy reasons" cited by the court below and the Commission indicate that denial of appellants' contentions would be "sound and well considered." (See Jurisdictional Statement, p. 13.)

CONCLUSION

In view of the foregoing it is respectfully submitted that the questions set forth in the jurisdictional statement are the proper questions to be considered on this appeal and that the primary question of whether the protection afforded by Congress to shield the labor force of the railroad industry from the effects of wholesale mergers resulting from the enactment of Section 5(2)(f), as interpreted by this Court in *Railway Labor*

Executives' Association v. United States, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed. 2d 774, is to be granted or denied the employees comprising that labor force, presents a substantial question for consideration by this Court.

Respectfully submitted,

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
ET AL., APPELLANTS ***

v.

UNITED STATES OF AMERICA, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN**

MOTION TO ADVANCE

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MOTION TO ADVANCE

Pursuant to Rule 43(4), the United States and the Interstate Commerce Commission, appellees, respectfully move that, in the event probable jurisdiction is noted, this case be advanced for hearing and decision during this Term of Court.

1. This is an appeal, filed January 9, 1961, from a decision of a three-judge district court affirming an order of the Commission. That order held that Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f), does not require, as a condition to approval of a railroad merger, that all affected employees be maintained in their present, or an equivalent, job status for the protective period prescribed by that section. The jurisdictional statement was

filed on January 27, 1961, and all of the appellees, including the Erie-Lackawanna Railroad, have waived the right to file motions to affirm in the interest of expedition of the case.

2. The decision below raises a significant issue as to the interpretation of the job protection provisions written into the Interstate Commerce Act by the Transportation Act of 1940. The early resolution of this question by this Court is highly desirable in order to end uncertainty and to clarify the circumstances under which the unification of rail systems in accordance with Congressional policy may take place. In addition to the present case, there are now pending before the Commission, at various stages of development, at least six other major railroad transactions falling within Section 5 of the Act. Most, if not all, of these cases will raise the issue presented here. Appropriate action in these proceedings can be materially advanced by early determination of the instant case.

3. Apart from the bearing of this case on other pending proceedings, there is a substantial public interest in the earliest possible resolution of the instant controversy. As we pointed out in our memorandum of January 12, 1961, opposing a stay of the Commission's decision pending the Court's consideration of this appeal:¹

¹ That motion was denied by the Court (three Justices dissenting) on January 23, 1961, without prejudice to its renewal upon the prompt docketing of the appeal. A renewed motion, which we are opposing, (see Memorandum for the United States and the Interstate Commerce Commission in Opposition to Motion for Stay, filed February 6, 1961) is now pending.

* * * we think it is manifest that in this situation some degree of irreparable injury is unavoidable whichever disposition is made of the motion for stay. On the one hand, it is clear that any postponement of the consolidation, insofar as it would achieve elimination of overlapping and uneconomical facilities and jobs, would necessarily result in loss to the railroad and thus further impair its present precarious financial situation. On the other hand, dismissals, demotions, or transfers of employees during the pendency of the appeal, even though the affected employees are given financial protection under the "New Orleans conditions" included in the Commission's order, would necessarily result in intangible but nonetheless very real injury.

It seems clear that, regardless of the Court's action on the application for a stay, both the employees and the carrier will continue to be subject to unsettling uncertainty until the matter is finally resolved. Even if a stay were granted, the employees' future would remain clouded and unsettled pending a decision on the merits. On the other hand, as the carrier has pointed out in its memorandum of February 3, 1961, even if a stay is denied, progress in consummating the merger will inevitably be delayed so long as the litigation continues.

Any delay in consummating the merger would have serious public consequences apart from the effects upon the private interests of the employees and the carrier. The Erie and the Lackawanna Railroads separately, and the merged railroad operating as an entity under the approved plan, perform vital trans-

portation functions essential to the well-being of important areas of the northeastern part of the country. These railroads, at the time of the Commission's consideration of the merger, were operating at substantial deficits; these deficits are continuing.* The public interest in efficient and economical railway service and in the sound economic condition of carriers, expressed in the National Transportation Policy (40 U.S.C. preceding § 1), strongly supports the view that there should be an early resolution of the present controversy so that the merger, the public benefits of which are not disputed, may be fully effectuated.

Accordingly, the government urges that, if probable jurisdiction is noted in the instant appeal, the case be advanced on the calendar for hearing at this Term.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel, Interstate Commerce Commission.
FEBRUARY 1961.

* See the carrier's memorandum of February 3, 1961, p. 6.

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~~JOHN E. BROWNING~~ Clerk

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the specially constituted district court of three judges (R. 196) is reported in 189 F. Supp. 942. The report of the Interstate Commerce Commission (R. 10) is published in 312 I.C.C. 185.

JURISDICTION

The final judgment and order of the United States District Court for the Eastern District of Michigan sitting as a specially constituted statutory district court of three judges was dated and entered on December 19, 1960. (R. 204). Notice of appeal was filed with the District Court on

January 9, 1961. (R. 205) The jurisdiction of this Court to review on appeal the final judgment and order of the District Court is conferred by 28 U.S.C. § 1253, 62 Stat. 926. An application for stay of the dissolution of a temporary restraining order entered by the District Court on October 14, 1960, preserving the employment status quo on the railroads involved, was filed with this Court on January 10, 1961. By order of this Court entered January 23, 1961, the stay was denied without prejudice to its renewal upon prompt docketing of this appeal. This appeal was docketed and the request for stay was renewed on January 27, 1961. This Court noted probable jurisdiction and granted the application for stay on February 20, 1961.

QUESTIONS PRESENTED

This case involves the proper interpretation of Sec. 5(2)(f) of the Interstate Commerce Act¹ and particularly the second sentence of that provision. In terms of the facts of this case, the questions presented are as follows:

1. Whether the Interstate Commerce Commission in its order approving the merger of the Erie and the DL&W violated the requirements of Section 5(2)(f) of the Interstate Commerce Act [49 U.S.C. 5(2)(f)] which section requires a fair and equitable arrangement for the protection of employee interests and as a minimum basis of such arrangement specifies that no employees of railroad carriers affected thereby shall be placed "in a worse position with respect to their employment" for a period of up to four years from the effective date of the Commission's order, depending upon the length of the employees' service, when its order approved the said merger subject to an arrangement which provides partial financial compensation for employees *after* and on specific condition that their

¹ Herein sometimes referred to as the Act.

position with respect to their employment has been worsened.

2. Whether railroad employees will be placed in a worse position with respect to their employment when, as a result of the Commission's order approving the Erie-DL&W merger, they will be deprived of their employment; placed in lower paying less desirable positions; forced to exercise their seniority rights and displace or deprive fellow junior employees of their jobs and be displaced or deprived of their jobs by fellow senior employees; forced to move their families to new places of employment, not once but an indefinite number of times during a five-year period following Commission approval until all job abolishments and displacements resulting from the merger have taken place, notwithstanding the fact that such order grants partial financial compensation to such employees *after* these effects have occurred.

3. Whether the Interstate Commerce Commission, and the District Court in upholding the Commission, misinterpreted the plain language of Section 5(2)(f), ignored the intent and purpose of Congress in enacting that provision into law and failed to apply the clear interpretation of that provision as set forth by this Court in its decisions in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 70 S. Ct. 530, 94 L. Ed. 721, and *The Order of Railroad Telegraphers v. The Chicago and North Western Railway Company*, 362 U. S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774.

4. Whether Section 5(2)(f) requires that railroad mergers be approved only upon such terms and conditions as will continue the current employees in equivalent employment for the prescribed period and will permit the economies to be realized at the expense of employees to be achieved only as the current forces are

reduced by natural attrition, i.e., as deaths, retirements, resignations, etc., occur.

An additional question, unrelated to those just listed, is:

5. Whether the statutory three-judge court erred in refusing to consider the sworn testimony of appellants' witness while accepting and relying upon excerpts from briefs and magazine articles, none of which were part of the record before the Commission or the court.

STATUTE INVOLVED

The statutory provision involved is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C. § 5(2)(f), which provides as follows:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

STATEMENT

In this case the Interstate Commerce Commission² approved the first of a series of major railroad mergers which seriously threaten the welfare and morale of the great majority of the employees who make up the railroad labor force of this country.³ (R. 76-77). The United States and the Interstate Commerce Commission in their joint brief to the District Court pointed out that there are now in various stages of consideration seven additional mergers involving the Seaboard Air Line Railroad Company; the Atlantic Coast Line; the New York Central; Baltimore and Ohio; Chesapeake and Ohio; Chicago, Burlington and Quincy; Great Northern; Northern Pacific; Spokane, Portland and Seattle; Norfolk and Western; New York, Chicago and St. Louis (Nickel Plate); the Wabash; Southern; Central of Georgia; Atchison, Topeka and Santa Fe; Western Pacific; Southern Pacific; Milwaukee; and Rock Island.

In addition, the New York Central and Pennsylvania have explored a possible merger of their roads; the Pennsylvania recently filed an application with the Commission to acquire control of the Lehigh Valley Railroad and has indicated that it will attempt a merger with the Norfolk and Western after the latter railroad obtains through merger the Nickel Plate and the Wabash; and the Commission has recently approved one merger involving the Soo Line, Wisconsin Central and the Duluth, South Shore and Atlantic and a second involving the Chicago and North Western and the Minneapolis and St. Louis.

² Herein called the Commission.

³ Prior to the filing of the merger-application in this case the Commission had approved the merger of the Norfolk and Western Railroad Company and the Virginian Railway Company. In that case, however, the railroads executed an agreement with the Railway Labor Executives' Association protecting the employment of all employees involved. Efforts by the Association to secure a similar agreement in this case have proved unavailing.

Little imagination is needed to picture the severe and extensive adverse effects that approval of such mergers will have on the morale and welfare of the railroad labor force unless the type of protection intended by Congress under Section 5(2)(f) is provided.

The present case began when the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company⁴ on July 6, 1959, filed a joint application with the Commission under Section 5(2), and other sections of the Act not here pertinent, to merge the properties and franchise of the DL&W into the Erie. The Railway Labor Executives' Association⁵ intervened in the proceeding to protect the interest of the employees of those railroads who are represented by the various labor railway organizations, the chief executive officers of which are members of the Association.

A hearing was held on the joint application for merger before a Commission hearing examiner. At the hearing evidence was submitted by the railroad applicants regarding their intentions with respect to employees. The evidence indicated that the merger would require five years to consummate subsequent to Commission approval. During the first year following Commission approval, according to the evidence, the merged railroad has planned to abolish 403 jobs and transfer another 430 jobs to points requiring the employees holding those jobs to move their homes; during the second year 818 jobs would be abolished and 958 jobs would be transferred; the third year would find 484 jobs abolished and 481 jobs transferred; the fourth year would see 190 jobs abolished and 191 jobs transferred; finally, during the fifth year 87 jobs would be abolished and 99 would be transferred. The total for the five-year period would be 1,982 jobs abolished and 2,159 jobs transferred. (R. 112).

⁴ Herein referred to as the Erie, the DL&W or the railroads.

⁵ Referred to herein as the RLEA or the Association.

On brief to the hearing examiner the RLEA contended that sub-paragraph (f) of Section 5(2) must now be applied as it originally was intended to be applied and that subparagraph (f) meant what it plainly said in providing that as a result of a merger no employees will be placed "in a worse position with respect to their employment" for four years from the effective date of the Commission's order or less depending upon the period of their previous service. The Association contended that for the prescribed period the Commission was required to condition the merger upon the railroad's providing comparable jobs at comparable pay with such savings as were to be realized at the expense of employees to be secured through natural attrition, that is as deaths, retirements, resignations, etc., occurred.^{5a} Such a method of securing the benefits of the merger could not work a hardship on the merged railroad since its evidence showed that while 4,141 jobs were being abolished and transferred, 12,116 would be created by attrition. (R. 112.)

In support of its position, the Railway Labor Executives' Association relied upon the plain language of Section 5(2)(f), its legislative history and the interpretation placed upon Section 5(2)(f) by this Court during the course of its opinion in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950).

The hearing examiner recommended the approval of the merger and the rejection of the Association's position but he did not discuss that portion of this Court's opinion in *Railway Labor Executives' Association v. United States*, *supra*, relied upon by the Association. (R. 183.) The examiner recommended the imposition of the so-called "New Orleans conditions" which were evolved subsequent

^{5a} Throughout this brief this type of protection is referred to as "employment protection" as distinguished from "compensation protection" which provides monetary allowances in lieu of employment and which has been imposed heretofore by the Commission.

to this Court's decision in *Railway Labor Executives' Association v. United States*, *supra*, and provide partial financial compensation for affected employees. (R. 188.) The "New Orleans conditions", however, do not prevent the worsening of an employee's position with respect to his employment but, in fact, require such an effect to occur before they become operative. These conditions do not protect an employee from being deprived of employment by the abolishment of his job; they do not protect an employee from the loss of accumulated annuity rights under the Railroad Retirement Act in the event he is deprived of his employment; they do not protect an employee from continued moves which result from later job abolishments and transfers resulting from the merger; and, most important of all in the light of the continual shrinkage of its plant by the railroad industry, they do not protect him from being forever deprived of employment in the railroad industry, an industry in which he may have spent years developing skills which are not readily adaptable to work in other industries. (R. 50-51, 77.) One or more of the foregoing effects of the merger must take place before the "New Orleans conditions" become operative. (R. 50.)

The Association filed exceptions to the employee protection recommendation of the examiner and asked to be heard by the appellate division of the Commission to which merger cases are referred, Division 4. On the motion of the Erie and the DL&W and over the objection of the Association, the Division 4 proceeding was eliminated and the matter was referred directly to the full Commission which heard oral argument.

The full Commission affirmed the examiner's recommendations on September 13, 1960, but in doing so made no mention of those portions of this Court's decision in *Railway Labor Executives' Association v. United States*, *supra*, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.

Ct. 761, 4 L. Ed. 2d 774, relied upon by appellants. (R. 10, 25-26.) The latter case was decided subsequent to the filing of the Association's brief to the examiner and was relied upon before the Commission as confirming by dictum this Court's interpretation of Section 5(2)(f) in the former case.

On October 7, 1960, ten days before the Commission's order was to become effective, the Brotherhood of Maintenance of Way Employees, a railway labor union the president of which is a member of the Association, instituted this action against the United States and the Interstate Commerce Commission by filing a complaint with the United States District Court for the Eastern District of Michigan. The complaint requested the issuance of a temporary restraining order pending a hearing on the merits by a statutory three-judge court. (R. 8-9.) The Erie and the DL&W intervened as party-defendants on October 10, 1960. (R. 36.)

After notice to all parties a hearing was held on October 12, 1960, before a single judge on the issuance of a temporary restraining order at which the Association intervened and all parties were given full opportunity to present evidence. (R. 39, 81-82.) The appellants informed the court that they were not interested in obstructing the merger of the railroads but merely wished to maintain the employment situation in status quo until the protective conditions required by Section 5(2)(f) could be imposed for the protection of employees. (R. 83.) The hearing consumed the entire day and the court issued a temporary restraining order on October 14, 1960, requiring the railroads to maintain the status quo regarding employment after they merged on October 17, 1960. (R. 160.)

A hearing on the merits was held on November 15, 1960, before three judges at which no additional evidence was received, however, argument was held on the issue of the interpretation of Section 5(2)(f). (R. 177.)

The District Court issued its decision on December 7, 1960, in which it called for the dismissal of the complaint and the dissolution of the temporary restraining order. Again no mention was made of those portions of the decisions of this Court in *Railway Labor Executives' Association v. United States*, *supra*, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, *supra*, relied upon by appellants. The court's decision also informed the parties that an order consistent with its decision might be presented. (R. 196, 202-203.)

On December 8, 1960, appellants filed a motion to maintain the status quo pending appeal to this Court. An argument was held on December 19, 1960, before the three judges of the District Court, at which no additional evidence was received and the court informed the parties that it would sign two orders, one dismissing the complaint and setting aside the temporary restraining order and another denying the motion to maintain the status quo pending appeal to this Court. These orders were signed and entered on December 19, 1960. (R. 204.) Notice of appeal was filed on January 9, 1961. (R. 205.)

SUMMARY OF ARGUMENT

I

The Commission conditioned its approval of the Erie-DL&W merger upon compliance by those railroads with the so-called "New Orleans conditions". These conditions provide financial compensation to employees who are deprived of their employment, placed in lower paying jobs or forced to transfer their homes as a result of the Commission's order of approval.

The New Orleans conditions do not protect an employee from the most serious effects of mergers such as the abolishment of his job and his loss of railroad employment; the loss of seniority rights; the loss of Railroad Retirement Act annuity rights; repeated transfers of

residence resulting from later job abolishments; and the loss of patiently and painstakingly acquired skills.

Congress intended no such hardships to be visited upon the railroad labor force of this country as a result of its enactment of Section 5(2). The protection which Congress provided in that section requires those railroads which utilize its provisions to arrange their mergers so as to provide work for all employees comparable to that which they theretofore had performed, for at least a four year period following Commission approval.⁶

Congress provided that jobs could be abolished during this period but only through the process of natural attrition as deaths, retirement, resignations, etc. occur. Congress therefore protected employees from the loss of their valuable employment rights. There is no provision against the loss of those rights to be found in the conditions imposed by the Commission in this case.

Congress had expected immediate and extensive use to be made of Section 5(2) by the railroad industry since it had been indicated such a provision was vital to the industry's financial recovery. At the same time Congress knew the vast majority of savings accomplished through merger could be realized only at the expense of the railroad labor force and so it provided very specific protection for employees as a counter to the threat which it had presented to them.

For reasons best known to itself, the railroad industry did not utilize the provisions of Section 5(2) to merge railroads although it did use the statute to consolidate individual railroad facilities. For these minor purposes the application of financially compensatory conditions was adequate and was in fact suggested by the railroad

⁶ The time limitations of Section 5(2)(f) also restrict the period of protection to the length of an employee's previous service if less than four years.

brotherhoods themselves. No mergers of any significance took place under the provisions of this Act until 1957 when the Louisville and Nashville Railroad Company and the Nashville, Chattanooga and St. Louis Railroad Company merged. At that time, however, there was no indication that the attitude of the railroad industry toward mergers had changed and that merger certainly presented no threat to the railroad labor force in the United States. Therefore, no objection was raised to the imposition of the "New Orleans conditions" in that case.

The picture has changed. Most of the major railroads in the United States are planning to merge with other railroads. The effect upon the railroad employment force will be extensive and severe. The railroad labor force is now confronted with the threat which Congress thought would materialize twenty years ago. The time has come therefore, for the employees to be afforded the protection intended by Congress to take effect when this threat arose.

It has taken twenty years for the railroad industry to utilize the tremendous economic weapon which Congress placed in its hands in 1940. Certainly the employees of that industry should not be prevented from utilizing at this time the shield which Congress provided against wielding of that weapon.

II

The first protection afforded employees from the effects of mergers and consolidations in the railroad industry is found in the Emergency Railroad Transportation Act of 1933, 48 Stat. 211. That law was enacted to save certain railroads from bankruptcy and to perpetuate an efficient means of rail transportation. *Louisville and N.R. Co. v. United States* (N.D. Ill., 1934), 10 F. Supp. 185, 191. That Act provided for the forced merger of the services and facilities of the railroads under the authority of a federal coordinator of rail transportation. It also provided that

regardless of what was done pursuant to its provisions no employee could be deprived thereby of employment or receive a lower wage. It is recognized that this Act created a "freeze" on employment.

One month before the 1933 Act was to expire, 85% of the railroads and 100% of the standard railroad unions executed an agreement which is known in the railroad industry as the Washington Agreement. This agreement departed from the employment protection concept established by the 1933 Act and provided financial compensation protection for all employees adversely affected as the result of mergers or consolidations.

In 1939 this Court held that the Commission had authority to impose employee protective conditions under the then applicable provision of the Interstate Commerce Act which contained no specific requirement of employee protection. *United States v. Lowden*, 308 U.S. 225, 60 S. Ct. 248, 84 L. Ed. 208 (1939).

The Transportation Act of 1940, which liberalized railroad merger requirements by requiring only that the Commission find proposed mergers to be "consistent with the public interest", returned to the employment protection concept established by the 1933 Act. Section 5(2)(f) required that for a period of four years subsequent to Commission approval of a merger employees could not be placed "in a worse position with respect to their employment".

In 1950 the Commission held that the "four-year" period referred to in subparagraph (f) was a maximum limitation upon its power. This Court held otherwise in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950). This Court held that the "four-year" period was the *minimum* limit of the Commission's power. No issue arose however regarding the *type* of protection required during the first four years following a merger.

III

The plain language of the second sentence of 5(2)(f) clearly provides that the protection afforded employees is not limited to compensation but must extend to the employment relationship itself. The term "employment" is not used as a term of art in Section 5(2)(f) and must be understood in its common, ordinary and usual sense. The term is defined as a "state of being employed". The statute forbids a worsening of an employee's position with respect to that state. Conditions which require a worsening of the state before they become operative do not satisfy the mandate of the statute.

The phrase "worse position with respect to employment" is an obvious melding of the two phrases found in the 1933 Act: "deprived of *employment*" and "*worse position with respect to compensation for such employment*".

Congress could have chosen the phrase "worse position with respect to compensation" and the use of that language would have left no doubt that only financial compensation protection was intended. Congress, however, very deliberately chose the phrase "worse position with respect to employment".

IV

The legislative history of Section 5(2)(f) virtually compels the conclusion that the second sentence of subparagraph (f) was intended for one purpose only—to preserve to each employee actively employed prior to the date of merger a continued active employment status substantially comparable to that which he held prior to the merger and at equivalent compensation; the protection to last for periods of up to four years following Commission approval of the merger, depending upon an individual employee's previous period of service.

The first sentence of Section 5(2)(f) was originally intended as the *sole* provision to be inserted in the Act for

the protection of employees adversely affected by transactions subject to Section 5(2). This provision was regarded as satisfactory by the majority of railroad labor and by all of railroad management, and was envisioned by them as statutory insurance of at least a continuance of the principles of the Washington Agreement. The first sentence of Section 5(2)(f) was recommended by the so-called Committee of Six, was passed by the Senate, and was reported favorably to the House by the House Interstate Commerce Committee. This sentence had a well-settled meaning, purpose and scope and was clearly regarded by the Congress as a provision under which the Commission could continue to exercise its discretion to grant protection along the lines of the Washington Agreement in much the same manner as it had theretofore been doing.

The original proposal of what is now the second sentence of Section 5(2)(f), the so-called Harrington Amendment, was designed, completely unlike the first sentence of the section, to insure that no employee *ever* would be deprived of employment or otherwise adversely affected with respect to his employment as a result of transactions approved under Section 5(2)(f) of the Act—in other words, the original Harrington Amendment would have required an indefinite “employment freeze”. As a result, savings from job reductions would have to be realized through the process of natural attrition. As modified by the House and Senate conference committees this original objective was changed in one respect only—its operation was limited in time to a period of four years and, as limited, now appears in the second sentence of subparagraph (f).

At all times during the consideration of Section 5(2)(f) it was evident that the second sentence was designed and regarded as a provision, separate from the first sentence, guaranteeing, at first indefinitely and then for a period of four years, *continued employment* with economies to be realized only through natural attrition. Finally, the section

as a whole was carefully explained by members of the Conference Committee which drafted the measure as finally enacted, as one which guarantees a minimum four years' employment protection plus such further measures of protection as the Commission in its discretion might consider appropriate. Throughout the entire proceedings in the House involving the Harrington Amendment no one advanced the thought that it did not protect the employment of railroad employees. One and perhaps two of its opponents expressed the fear that its modified language on return to the second conference gave employees *more* protection than did its original language. They thought it might be interpreted as giving employees a choice between active employment or compensation for life if they decided not to remain employed. The author of the legislation used direct unequivocal language in stating that such a view was "completely erroneous."

V

When this Court issued its decision in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950), it had carefully reviewed the legislative history of Section 5(2)(f) and had a clear understanding of the effect, intent and meaning of the Harrington Amendment. In its opinion in that case this Court indicated its belief that the Harrington Amendment in its original form would have been unworkable since it threatened to prevent the consolidations to which it related. The Court recognized that the motion to recommit effected a "substantial change" in the Harrington Amendment but recognized that change as one which merely limited the operation of the Harrington Amendment to four years. It was this time limitation which, in the words of this Court, made the Harrington Amendment workable:

"The second sentence thus gave a limited scope to the Harrington amendment and made it workable by putting a time limit upon its otherwise prohibitory effect."

Ten years later this Court issued its decision in *The Order of Railroad Telegraphers v. Chicago and North Western R. Co.*, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774, which should have removed any possible doubts regarding this Court's view of the express requirements of the second sentence of 5(2)(f).

During the course of its opinion, which upheld the right of a rail labor union to bargain for stabilized employment under the Railway Labor Act, the Court referred to Section 5(2)(f) in the following terms:

"It requires the Commission to do this by including 'terms and conditions' which provide for a term of years after a consolidation employees not be 'in a worse position with respect to their employment' than *they would otherwise have been.*" (362 U.S. at 337, emphasis supplied.)

Obviously, the italicized clause in the foregoing quotation could mean only that Section 5(2)(f) requires the *employment* status of railroad employees to be the same, or at least no worse, for the prescribed period subsequent to the merger than before. This construction of the Court's opinion is confirmed by reference to the dissenting opinion which disagrees with the interpretation of the majority and states that nothing in Section 5(2)(f) "authorizes the Commission to freeze existing jobs."

Both the Commission and the District Court refrained from commenting upon the particular portions of this Court's opinions quoted above. Counsel for appellees could only argue below that the precise holdings in those two cases were inapposite but made no attempt to discuss the statements relied upon by appellants. We can only conclude from such reluctance to discuss these statements an inability to view them other than as interpreting Section 5(2)(f) as granting employment protection for the four year period following Commission approval of a merger.

VI

The Interstate Commerce Commission attempts to support its decision that Section 5(2)(f) requires only compensation protection by citing cases which were decided long ago and well before the issue presented to this Court was raised by anyone. The Commission also relied upon the "contemporaneous construction" doctrine. This Court rejected the Commission's reliance on that doctrine in its 1950 decision interpreting Section 5(2)(f) when it stated (339 U.S. at 154):

"The Commission's interpretation of this statute, although entitled to weight, is not persuasive."

A similar conclusion is applicable here particularly since the issue before this Court has never been decided by the Commission.

The Commission placed great reliance upon two short and informal colloquies which took place on the floor of the House. These colloquies, however, are so vague as to be susceptible of citation in support of the appellants' position, as well as that of the appellees.

The District Court relied upon certain articles from 1940 issues of railway union magazines which had not been placed in evidence with the court. Aside from the fact that reliance upon such material is contrary to decisions of this Court, *United States v. United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884, the articles relied upon were taken from the magazines of a small minority of the railroad brotherhoods, and at that, brotherhoods which had *opposed* the Harrington Amendment because they felt insistence upon its enactment would have killed the entire provision relating to mergers.

The District Court dismissed the clear and extensive legislative history of Section 5(2)(f) with the statement that the original language of the Harrington Amendment was not adopted into law and that the "Congress knew what the Harrington Amendment sought to accomplish and

refused to include that language or its *equivalent*." (Emphasis supplied.)

The Court finally concluded that the term "worse position with respect to employment" did not refer to "employment" at all but made no finding as to what it otherwise possibly could have been intended to mean; yet it held that there was no "ambiguity within the structure of Section 5(2)(f)."

Both tribunals failed to come to grips with the most convincing factors supporting employment protection—the opinions of this Court in the *RLEA* and *ORT* cases, *supra*; the clear, unequivocal and unchallenged statements of the author of the provision, Rep. Harrington; and the statements of all those who spoke in support of the provision.

VII

The District Court erred in refusing to receive the testimony of Mr. H. C. Crotty, president of the Brotherhood of Maintenance of Way Employees⁷ and a member of RLEA, at the hearing on the merits and compounded that error by considering matters outside the record.

The Crotty testimony explained in detail the effect of the merger upon employees. As such it was a mere amplification of the record before the Commission and should have been admitted and considered. *United States v. State of Idaho*, 298 U.S. 105, 109, 56 S. Ct. 69, 80 L. Ed. 1070; *Baltimore & Ohio Railroad Company v. United States*, 298 U.S. 349, 353-354, 372, 56 S. Ct. 797, 80 L. Ed. 1209.

The rule is particularly applicable here because the District Court relied upon six excerpts from various union journals in reaching its decision which had been referred to in appellees' brief and on oral argument but had not been offered or received in evidence either in the District Court or before the Interstate Commerce Commission.

⁷ Herein called the Brotherhood.

ARGUMENT

The record developed at the hearing before the examiner contained undisputed evidence that approval of the merger would cause extensive employee adverse effect through job abolishments and job transfers (R. 112) and the proceeding admittedly is subject to the provisions of Section 5(2)(f). Therefore, there were present before the Commission and are now present before this Court all elements necessary to require compliance with the mandate contained in the second sentence of Section 5(2)(f).

The Commission, the Erie-Lackawanna and the appellants were and are in agreement that the "New Orleans conditions" provide only financial compensation as a means of partially alleviating the hardships visited upon employees as a result of a merger. The Commission also was well aware of the practical effect of the application of the "New Orleans conditions". In view of these circumstances, there was no need to present to the Commission evidence additional to that which already had been placed in the record by the railroads. Nor was there any *need* for the introduction of additional evidence before the District Court. The discussion of the detailed effects of this merger upon the employees of the former Erie and DL&W railroads which is contained in this brief is ~~based~~ upon the testimony before the three-judge court of Mr. H. C. Crotty, president of the Brotherhood and a member of the Association, and the exhibits introduced through him. This evidence was adduced to acquaint the District Court with the serious problems confronting railroad employees upon mergers, the effects of mergers upon employees, and the practical effect of the application of the "New Orleans conditions" to employees who have been placed in a worse position with respect to their employment as the result of a merger. Appellants do not believe a discussion of such detailed effects upon employees is necessary for a proper determination of the primary legal issue before this Court*—the interpre-

* For this reason, the detailed effects of the merger on employees is not set forth in the appellants' STATEMENT, *supra*.

tation of Section 5(2)(f), but it is useful in affording a comparison between the effects of "employment" protection and "compensation" protection. In addition, the evidence upon which the discussion is based supports appellants' request for a permanent injunction pending Commission compliance with the statute.

I

SUMMARY OF APPELLANTS' POSITION

The Interstate Commerce Commission conditioned its approval of the Erie-Lackawanna merger upon compliance by that railroad with the provisions of the so-called "New Orleans conditions". (R. 26.) These "conditions" require monetary payments to be made to employees whose employment status with the Erie-Lackawanna has been worsened as a result of the merger by dismissal, displacement or transfer. (R. 50, 139-159.)

The "conditions" provide that employees who are deprived of employment as a result of the merger are to receive financial compensation in lieu of employment; employees who are placed in lower paying jobs are to be provided compensation equalling the difference between their former and their present wages; employees required to move as a result of the merger are to be compensated for their moving expenses. The "conditions" are automatically inoperative until *after* the occurrence of such effects. It is only then that the "conditions" provide financial compensation to alleviate partially the effects of an employee's having been placed in a worsened employment status. (R. 50, 139-159.)

When it is free to do so the merged railroad will abolish certain jobs and transfer other jobs. The employees directly affected then must exercise their seniority rights to secure other positions with the railroad. Such rights

arise from collective bargaining agreements* executed by the railroads and the representatives of their employees and are evidenced by "seniority rosters" which set forth the names of the employees in order of seniority together with the date upon which their seniority rights are based. Each employee has seniority rights superior to employees listed below him on the roster and inferior to those listed above him. The seniority rights of an employee may be exercised only against other employees whose names appear on the same seniority roster on which his name appears. The seniority roster contains the names of all employees in a particular class or craft in a seniority district which is usually geographically co-extensive with a railroad division and may cover several hundred miles. (R. 44.)

When an employee is directly affected by the abolishment or transfer of his job, he goes immediately to the seniority roster and determines the employee who is junior to him whom he can displace or "bump". (R. 44.) Under the terms of the so-called "New Orleans conditions", the employee *must* exercise his seniority rights in order to obtain the financial compensation provided in those "conditions". (R. 50.) The exercise of these rights may involve the displacement of a junior employee one hundred miles away. (R. 44.) The "New Orleans conditions" would require the railroad to pay the employee's moving expenses to his new job and if that job paid less than his former job the railroad would be required to make up the difference. (R. 155-156, 157-158.) The employee who was displaced or "bumped" would also be required to exercise his seniority rights and perhaps move one

* The collective bargaining agreements which appellant Brotherhood maintains with the Erie and the DL&W were introduced into evidence at the hearing before Judge Thornton as Exhibits Nos. 3, 4, 5 and 6. Mr. Crotty testified that the collective bargaining agreements maintained with the Erie and the DL&W by the unions whose chief executive officers are members of the Association "are identical in principle" to the Brotherhood's agreements insofar as seniority rights are concerned. (R. 60.)

hundred miles to a new location where he would "bump" another employee who might be required, through the exercise of his seniority rights, to "bump" still another employee and this process would continue until it reached the man at the bottom of the seniority roster who would be deprived of employment. (R. 50-51, 77.) This man would receive a "dismissal allowance" which would be decreased in amount by any other income he received subsequent to his dismissal. (R. 156-157.)

Should the railroad abolish another job which directly affected the employee immediately senior to the first man mentioned above, the process would begin all over again and none of the employees who previously had been required to move would receive moving expenses. (R. 50.) Nor would they have any guarantee that they would not be required to move a third, fourth or fifth time as the result of additional job abolishments by the railroad company. For each employee whose job is directly abolished or transferred, two, ten or perhaps twenty employees may be adversely affected in their employment and those employees do not receive even moving expenses if they have been required to move previously. (R. 50.)

The hardship created by the abolishment and transfer of approximately 4000 jobs, therefore, is not limited to the 4000 employees occupying those jobs but is extended to every employee of the railroad whose seniority rights are inferior to those of the employees directly affected and who, because of that fact, must uproot his family and move to a new community with no guarantee that a week or a month later he will not be compelled to move again. The "New Orleans conditions" contain no protection whatever against this serious hardship. (R. 47.)

Furthermore, the "New Orleans conditions" do not protect an employee from having his job abolished and his active employment with the railroad terminated; they do not protect an employee from a loss of accumulated annuity

rights under the Railroad Retirement Act in the event he is deprived of employment; and they do not protect him from being forever deprived of employment in the railroad industry, an industry in which he may have spent years developing skills which are not readily adaptable to work in other industries. (R, 50-51, 77.)

It is the position of the appellants that in enacting Section 5(2)(f) of the Interstate Commerce Act, Congress intended to prevent the wholesale dumping of thousands of unemployed railroad men onto the labor market and to protect the valuable rights accrued and the skills developed over the years by employees in the railroad industry which could be seriously affected or lost altogether as a result of the enactment of Section 5(2). The protection which Congress provided in enacting subparagraph (f) requires railroads which utilize the privileges conferred by Section 5(2) to work out their merger arrangements so as to provide for all employees work comparable to that which they had performed prior to the merger. However, Congress did not intend to require merged railroads necessarily to continue in effect the same number of jobs which existed prior to merger. Congress knew that jobs would be abolished and did not prevent such a result. However, it provided that for a period of at least four years after Commission approval, jobs could be abolished only through the process of natural attrition, i.e., as retirements, deaths, discharges, resignations, etc., occurred. As a result of this legislation mergers could be effected and jobs abolished but gradually and without the demoralization of the labor force which would surely result if jobs could be abolished at will.

Congress also was aware that in enacting Section 5(2) it was providing the railroads of the United States with a tremendous economic weapon. This law liberalized the then existing merger provisions of that Act and thereby alleviated a serious financial problem facing the railroads by permitting them to eliminate competition and reduce ex-

penses. Congress, however, in granting this right of easy merger to the railroad industry also placed upon it a concurrent responsibility. While it granted the railroads a means of reducing competition within the industry, it also imposed upon it the responsibility of seeing to it that for a period of four years from the effective date of orders approving mergers there would be no wholesale abolishment of jobs and dumping of railroad employees onto the open labor market. The Congress assured the industry's execution of this responsibility by requiring the Interstate Commerce Commission to include in each of its orders approving a merger "terms and conditions" which provide that for a period of four years from the date of such order the merger will not result in the railroad employees involved being placed "in a worse position with respect to their employment than they would otherwise have been." *The Order of Railroad Telegraphers, et al. v. Chicago and North Western R. Co.*, 362 U.S. 330, 337, 80 S. Ct. 761, 4 L. Ed. 2d 774, (1960).

The "terms and conditions" required by Section 5(2)(f) permit a merged railroad to transfer work from one point to another but require the railroad to allow its employees to follow that work. If fewer employees are needed by the merged railroad than were needed by its predecessor railroads, the surplus will be absorbed and swiftly eliminated by natural attrition.¹⁰ To this limited extent, the full benefits of the merger may be partially and temporarily postponed.¹¹

¹⁰ In the present case, the Erie and the DL&W informed the Commission that it intended to abolish 403 jobs during the first year following approval of the merger but during the same period 2507 jobs would be created by attrition, and during the first five years following the merger 1982 jobs would be abolished while 12,116 jobs would be created by attrition. (R. 112.)

¹¹ This is also a recognized effect of the discretionary imposition of compensation protection under Section 1(18) of the Act but has been rejected by the Commission as a reason for refusing to provide such protection. *Pac. Elec. Ry. Co. Abandonment, Etc.*, 275 I.C.C. 649, 676 (1952).

The "terms and conditions" intended by Congress to be imposed in merger cases would not deprive employees of the railroads of any of the rights which they have acquired over the years. Furthermore, the railroad industry would be able to accomplish all its desired objectives through merger and the public would reap the benefits of an industry with a high level of employee skill and morale.

II

HISTORY OF EMPLOYEE PROTECTION IN THE RAILROAD INDUSTRY

The first example of direct and specific provision for the protection of railroad employees is found in the Emergency Railroad Transportation Act of 1933, Act of June 16, 1933, Ch. 91, Sections 1-17 and 209, 48 Stat. 211. This law was enacted in a time of great financial peril for the railroad industry. It was passed to save certain railroads from bankruptcy and to perpetuate an efficient means of railroad transportation in the United States. *Louisville and N. R. Co. v. United States* (N.D. Ill., 1934), 10 F. Supp. 185, 191. In the words of the district court in the *Louisville and N. R. Co.* case, the 1933 Act evidenced "the announced policy of the Government to render assistance to all carriers and keep their heads above water until calmer times appeared." 10 F. Supp. at 192.

Certain provisions of the 1933 Act amended the merger provisions of the Transportation Act of 1920, 41 Stat. 480. Other provisions of the 1933 Act provided for the appointment of a federal coordinator of railroad transportation who was charged with the duty of encouraging, promoting or requiring action on the part of railroads, which would avoid unnecessary duplication of services and facilities, and promote financial reorganization. There was also provision for the immediate study of other means of improving conditions surrounding railroad transportation. [1933 Act, Section 4, 48 Stat. 212.] All action taken to carry out the pur-

pose of the 1933 Act was governed by Section 7(b) which provided as follows:

"The number of employees in the service of a carrier shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay rolls of employees in service during the month of May, 1933, after deducting the number who have been removed from the pay rolls after the effective date of this Act by reason of death, normal retirements, or resignations, but not more in any one year than 5 per centum of said number in service during May, 1933; nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." (Emphasis supplied)¹²

It is of striking significance to our inquiry here that by enacting this provision Congress obviously felt the railroads could be saved from bankruptcy and an efficient means of railroad transportation perpetuated while preserving the employment of all actively employed railroad workers and that an attrition rate limited to five percent per year of total employment would permit the accomplishment of these objectives of the Act. The Erie-Lackawanna attrition rate is twice as great as that which Congress permitted to take place under the provisions of the 1933 Act. (R. 53, 112.) Congress, therefore, did not believe

¹² 48 Stat. 213. Paragraph (d) of Section 7 directed the Federal Coordinator of Railroads to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when it had been transferred:

Section 7(d). "The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title."

that employment protection violated the National Transportation Policy.

The italicized words quoted above emphasize Congressional awareness of the difference between an employee being placed "in a worse position with respect to his compensation" and an employee being placed "in a worse position with respect to his employment". Both "deprived of employment" and "no worse position with respect to compensation" were necessary to provide employment protection in the 1933 Act—if the latter clause had been eliminated there would have been no obligation to maintain the previous level of pay; if the former clause had been eliminated the pay would have remained the same but there would have been no obligation to retain the men in service.

Section 7(b) of the 1933 Act clearly provided that in mergers or other matters to which it applied, an employee must be given a job at least equivalent to his former position and compensation equal to that which he formerly received; in other words, he must be placed in no "worse position with respect to his employment".

Section 17 of the 1933 Act provided that the provisions relating to the federal coordinator should expire on June 16, 1934, unless extended by proclamation of the President. The Act was extended to June 17, 1936, on which date it expired.

One month before the 1933 Act was to expire, an agreement was executed in Washington, D. C., by 85% of the major railroads in the United States and all of the standard railroad labor unions. This agreement was entitled "Agreement of May, 1936, Washington, D. C." and is commonly referred to in the railroad industry as the "Washington Agreement." (R. 139.) The purpose of the agreement was to provide partial financial protection to employees who were deprived of their employment or otherwise ad-

versely affected in their employment as a result of a "coordination".¹³

The expiration of the 1933 Act did not affect the merger provisions of the Transportation Act of 1920. Section 5(4) of the Interstate Commerce Act permitted approval of a merger upon findings by the Commission that such merger would "be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and will promote the public interest."¹⁴ The Commission had the power to approve a merger "upon the terms and conditions and with the modifications so found to be just and reasonable."¹⁵

In 1939, this Court unanimously reversed a district court decision and affirmed the Commission's power to impose employee protective conditions as "just and reasonable conditions" in the public interest. *United States v. Lowden*, 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208 (1939). In its decision, the Court said (308 U. S. at 233, 234):

¹³ A "coordination" is defined in Section 2(a) of the Agreement as "joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such facilities."

¹⁴ Act of February 28, 1920, Ch. 91, 41 Stat. 480, 482; Act of June 16, 1933, Ch. 91, Title II, 48 Stat. 217-220.

¹⁵ *Ibid.* It is to be noted that Section 5(2) permits the Commission to approve mergers if it finds them to be "consistent with the public interest" whereas the merger provisions of the 1920 Act as amended by the 1933 Act required the Commission to find that such mergers would promote the public interest and not merely be consistent with that interest. In addition, the Commission had to find that the merger would be in furtherance of the plan for the consolidation of railway properties which had been established by the Commission in accordance with Section 5(3) of the Interstate Commerce Act as it had been amended by the 1933 Act. Section 5(3) provided for the adoption by the Commission of a plan for the consolidation of the railway properties "of the continental United States into a limited number of systems."

"It is thus apparent that the steps involved in carrying out the congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute."

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"One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system."

The Transportation Act of 1940, 54 Stat. 899, effected a considerable liberalization of the merger requirements of the Interstate Commerce Act. No longer would railroads seeking authority to merge be required to prove that their merger would be "in harmony with and in furtherance of" a national plan for railroad consolidation established by the Commission or that it would "promote" the public interest. The railroads now need only prove that their merger would be "consistent" with the public interest.

A detailed review of the legislative history of subparagraph (f) of Section 5(2) will be presented in a later section of this brief. Suffice it to say for the present that Congress quite naturally expected immediate and extensive utilization of the liberalized merger provisions¹⁶ as the

¹⁶ See *County of Marin v. United States*, 356 U.S. 412, 78 S.Ct. 880, 2 L.Ed. 2d 879 (1958) in which this Court said (356 U.S. at 416-417): "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system."

railroad industry had indicated such provisions were vital to its financial recovery. At the same time Congress was thoroughly familiar with the serious and extensive adverse effect which the utilization of Section 5(2) would have on railroad employees. Therefore, in enacting those provisions, Congress added a subparagraph (f) which required mandatory protection for railroad employees substantially the same as that which it had provided for such employees in the 1933 Act. Specifically, Congress provided that employees could not be placed "in a worse position with respect to their employment" as a result of the utilization of the liberalized merger provisions, and for a period of four years thereafter.

In 1950 a question arose as to whether the four-year period contained in the second sentence of Section 5(2)(f) should be regarded as a maximum limitation upon the power of the Commission to impose conditions or a minimum limitation upon that power. This question arose as a result of the Commission's approval of an application under Section 5(2)(f) to consolidate passenger terminal facilities at New Orleans, Louisiana, by the construction of a terminal to be called the New Orleans Union Passenger Terminal. The Commission regarded the four-year period as a maximum limitation upon its power and it, therefore, limited the period of protection granted in that case to four years from the date of its order approving construction of the terminal. That limitation would have meant the complete loss of protection to employees affected by the construction of the terminal since the construction could not be completed within four years from the date of the Commission order and the employees would not be affected until the terminal had been completed. *New Orleans Union Passenger Terminal Case*, 267 I.C.C. 763.

The matter was pursued before the United States District Court for the District of Columbia which upheld the Commission and was then appealed to this Court, which reversed the District Court and the Commission. *Railway*

Labor Executives' Association v. United States, 339 U.S. 142, 70 S. Ct. 530, 94 L. Ed. 721 (1950). This Court reviewed the legislative history of Section 5(2)(f) and concluded as follows (339 U.S. at 155):

"We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation."

The issue before the Court in the last cited case involved the provisions of Section 5(2)(f) only insofar as they applied to employees affected *after* the expiration of four years from the date on which the Commission had entered its order. The primary issue now presented to this Court, and which was presented below, is the protection required to be afforded employees *within* the period of four years subsequent to the Commission's order.

We will now discuss that issue from the standpoint of the plain language of Section 5(2)(f), its legislative history, and its interpretation by this Court.

III

THE PLAIN LANGUAGE OF THE STATUTE CLEARLY REQUIRES PROTECTION OF AN EMPLOYEE'S STATUS WITH RESPECT TO HIS EMPLOYMENT

For the convenience of the Court in following the argument to be advanced in this section, we repeat the language of the first and second sentences of Section 5(2)(f):

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrange-

ment to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

On its face the first sentence of the section plainly vests in the Commission the discretion to determine what will constitute fair and equitable protection for employees. This provision makes mandatory a fair and equitable arrangement for the protection of employee interests, but leaves within the Commission's discretion the determination of the nature and scope of the particular type of protection to be afforded.

The second sentence of Section 5(2)(f), however, provides a specific type of protection which is not left to the Commission's discretion but which is spelled out in the provision and which *must* be imposed in all cases as a *minimum* protection. This specific protection is limited in time to four years from the effective date of the Commission's order approving a transaction under Section 5(2). The protection is referred to only as "employment" protection.

There is nothing in subparagraph (f) or Section 5 or the entire Interstate Commerce Act which would indicate that the term "employment" was inserted by Congress in subparagraph (f) as a special term of art and should therefore be understood in any sense other than that which is ordinarily and usually attributed to it. See *Caminetti v. United States*, 242 U. S. 470, 485-486, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

This court has reiterated on innumerable occasions the fundamental rule of statutory construction that the "nat-

ural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant." *United States v. First National Bank*, 234 U. S. 245, 258, 34 S. Ct. 846, 58 L. Ed. 1298. See also *Western Union Teleg. Co. v. Lenroot*, 323 U. S. 490, 65 S. Ct. 568, 76 L. Ed. 1128; *Southern R. Co. v. United States*, 222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Columbia Water Power Co. v. Columbia Elec. Street R. L. & P. Co.*, 172 U. S. 475, 19 S. Ct. 247, 43 L. Ed. 521. The "natural and usual signification" of the term "employment" is the "state of being employed." Webster's New Collegiate Dictionary, 2nd Ed. The first sentence grants compensation protection based upon the provisions of the Washington Agreement and that is the only protection that has ever been afforded employees under Section 5(2)(f) by the Commission. Therefore, the second sentence becomes meaningless if it does not provide employment protection.

The employment relationship, of course, constitutes the total relationship between the employer and the employee and consists of many benefits which cannot be measured in terms of financial compensation equal to an employee's wages.

Since Section 5(2)(f) states that an employee shall not be placed "in a worse position with respect to his employment", conditions which provide only financial compensation equal to wages previously received, as provided by the "New Orleans conditions" imposed in this case, do not satisfy the requirements of Section 5(2)(f) as they permit, indeed require, the worsening of the employee's position with respect to his employment, his state of being employed, before they become operative. In order to satisfy the mandate of subparagraph (f), conditions must be imposed which prohibit the worsening of an employee's position with respect to his employment.

The second sentence of this section is now well recognized as providing the minimum protection afforded by Con-

gress. The first sentence of the section permits the Interstate Commerce Commission to *go beyond* that minimum protection if it feels that additional protection is required in order to afford the employees a "fair and equitable arrangement to protect" their interests.

If we desire to buttress the clearly apparent meaning of the term "worse position with respect to their employment", we need only to refer to the language used by Congress in providing employment protection in the Emergency Railroad Transportation Act of 1933.¹⁷ A comparison of Section 5(2)(f) with Section 7(b) discloses that Congress merely combined the terms "deprived of employment" and "worse position with respect to compensation from such employment" into one term—"worse position with respect to employment"—and placed it in Section 5(2)(f). Neither of the terms referred to in Section 7(b) standing alone adequately would protect employees with respect to their employment. If Section 7(b) contained merely the first term and not the second employees might be kept on but could be given menial jobs at far lower rates of pay. If the second term stood alone in Section 7(b) the railroads affected thereby would have no obligation to continue a particular employee in active employment, although required to continue paying his wages. The same effects would have occurred under Section 5(2)(f) had Congress incorporated either of the two terms in that provision without incorporating the other. Congress, however, combined the two terms and in doing so provided adequate employment protection.

It seems obvious that an employee is not maintained in no "worse position with respect to employment" if he

¹⁷ Sec. 7(b) of the 1933 Act provided "• • • nor shall any employee in such service be deprived of employment • • • or be in a worse position with respect to his compensation for such employment • • •"

is discharged, or if he is kept on but placed in a lower paying job.¹⁸

We respectfully submit that "worse position with respect to employment" means precisely what it so plainly says and we further submit that there is no other way in which Section 5(2)(f) reasonably can be construed. Moreover, this is the only construction consistent with the legislative history of Section 5(2)(f) and the decisions of this Court in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 151-154, 70 S. Ct. 530, 94 L. Ed. 721 (1950) and *The Order of Railroad Telegraphers v. Chicago and N. W. Ry. Co.*, 362 U. S. 330, 355, 80 S. Ct. 781, 4 L. Ed. 2d 774 (1960).

It is also a fundamental rule of statutory interpretation that resort to legislative history may not be had where the language used is clear or if done to construe a statute contrary to its plain terms. *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89, 56 S. Ct. 70, 80 L. ed. 62; *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 199, 33 S. Ct. 893, 57 L. Ed. 1446. This Court has also held

¹⁸ In their joint-brief to the District Court the United States and the I.C.C. suggested that the use of the novel term "in their employment" would more readily have been used by Congress than the familiar term "worse position with respect to their employment" had Congress intended to provide employment protection in Section 5(2)(f). It seems extremely unreasonable to suppose that Congress would have resorted to the novel term suggested by the appellees when it had available to it in both the 1933 Act and the Washington Agreement the more familiar "worse position with respect to." Certainly, had Congress intended only compensation protection it easily could have substituted the word "compensation" for "employment" and merged railroads would have been free to furlough and discharge their employees at will so long as they kept them whole financially. It was also argued that the term "worse position with respect to compensation" is a term of art because of its use in the 1933 Act and the Washington Agreement and implies that an employee will be retained in active service. If that term used in conjunction with "compensation" implies continued employment then *a fortiori* its use in conjunction with "employment" compels such a conclusion.

that it is not at liberty to construe language so plain as to need no construction. *Helvering v. City Bank, Etc., supra*, 296 U. S. at 89. In view of these rules and the unmistakable clarity of the phrase "no worse position with respect to their employment" as used in subparagraph (f), it is respectfully submitted that no resort to legislative history need, or should, be had in this case. However, if, notwithstanding these applicable rules of statutory construction, the Court believes it should resort to the legislative history of Section 5(2)(f) there will be found a clarity of congressional intent almost unique in character. The legislative history of Section 5(2)(f) leaves no doubt as to Congress' intent when it very deliberately used the phrase "worse position with respect to their employment" in the second sentence of that provision.

IV

LEGISLATIVE HISTORY COMPELS THE CONCLUSION THAT EMPLOYEES MUST NOT BE ADVERSELY AFFECTED IN THEIR EMPLOYMENT FOR FOUR YEARS

The history of Section 5(2)(f) was exceedingly protracted in the light of the brief section which finally emerged. The true intent of the language which resulted can be readily understood against the backdrop of the intense struggle which characterized its passage—a struggle in which two forces of railway labor, with entirely different aims and objectives, finally saw their separate objectives each enacted into law.

Any confusion or misunderstanding which possibly might exist concerning the nature of the mandate contained in the second sentence is quickly dispelled by examination of this legislative history.

A. Background of the Legislation

The situation which gave rise to the Transportation Act of 1940 was briefly this: The financial condition of the railroads had evoked considerable concern over a period begin-

ning about 1929 and by 1940 about 1/3 of the railroad mileage in the country was in the hands of receivers and trustees.¹⁹ On September 20, 1938, the President appointed a special committee known as the "Committee of Six", the membership of which was equally divided between management and labor,²⁰ and directed them "to consider the transportation problem and recommend legislation."²¹ It was their recommendation with respect to proposed changes in the merger and consolidation sections of the Interstate Commerce Act that there be made compulsory "a fair and equitable arrangement to protect the interest of the ... employee".²²

*As far as the general question of mergers and consolidations was concerned, there was at that time no controversy either in or outside the Committee of Six. The Interstate Commerce Commission had flatly stated that the elimination of the provisions in the Transportation Act of 1920 requiring the Commission to direct the consolidation of railroads into a pre-arranged limited number of systems was one of the primary purposes in amending that

¹⁹ H.R. Doc. No. 583, 75th Cong., 3rd Sess., pp. 33, 48.

²⁰ The Committee of Six was composed of Mr. M. W. Clement, President, Pennsylvania Railroad; Mr. E. E. Norris, President, Southern Railway; Mr. C. R. Gray, Vice Chairman, Union Pacific Railroad; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks and Chairman of the Railway Labor Executives' Association; Mr. B. M. Jewell, President of the Railway Employees' Department of the American Federation of Labor; and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen. (Hearings on Transportation Act of 1939, Senate, pp. 4-5).

²¹ Report of the Committee to the President, dated December 23, 1938, p. 1. The Report is reprinted on pp. 257-308 of Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H.R. 2531 and H.R. 4862, hereinafter referred to as "House Hearings".

²² House Hearings, p. 275.

Act.²³ This plan had proved a failure and it was the consensus of opinion in the Committee of Six that it should be abandoned.

It was conceded, however, on all sides that economies could be brought about through consolidations and mergers of rail carriers voluntarily proposed. It was further conceded that these economies would be realized principally at the expense of railroad labor. At first glance, this would appear to present one of those controversial questions of labor relations which the Committee of Six desired to avoid. Such, however, was not the case because the potential conflict of interests between the parties had already been adjusted through the execution of the Washington Agreement in May 1936. (R. 139.)

Accordingly, there was no controversy between the members of the Committee of Six as to the question of the protection of employees in consolidation cases, and the Committee could recommend, as it did, that in passing upon a carrier's application for leave to effect a consolidation, the tribunal having jurisdiction "shall examine into probable results of the proposed consolidation and require as a prerequisite to its approval a fair and equitable arrangement to protect the interest of the . . . employee."²⁴

It must be remembered that when the Committee made this recommendation, it merely advocated doing what the employee organizations and most of the railroads had already done through their execution of the Washington Agreement. That the above is an accurate appraisal of the reasons which actuated the Committee is revealed in the testimony of Mr. Harrison when he stated as follows:

"Now, the existing situation is this: In 1936 in the Spring of that year, we made an agreement with about 85 per cent of the mileage of the country providing a schedule of benefits for workers that might be affected

²³ Id. at p. 31.

²⁴ House Hearings, p. 275.

by consolidations or mergers. That agreement has now been in operation for about three years and it has worked out very satisfactorily. It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made."²⁵

B. Senate Proceedings

Pursuant to the recommendations of the Committee of Six, Senators Wheeler and Truman, on March 30, 1939, introduced a bill, S. 2009, concerning which Senator Wheeler stated:

"We did take the recommendations of the Committee of Six, and we used them as a basis for much that is contained in the pending bill, . . ."²⁶

Section 49 of the bill dealt with the subject of mergers, unifications, consolidations, etc., and provided that, among other things (Sec. 49(3)(c)):

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."²⁷

²⁵ Id. at pp. 216-217.

²⁶ 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6136.

²⁷ This language is almost identical with the recommendation of the Committee of Six, *supra*.

Hearings were commenced before the Senate Committee on Interstate and Foreign Commerce on April 3, 1939, and on that day Mr. Harrison testified. He stated that if it became necessary or desirable to have unifications or consolidations with resulting displacement of men a reasonable adjustment such as labor then had with management²⁸ would "in the main" protect labor. His testimony is of importance to the issue now before this Court because it demonstrates that the statutory proposal of the Committee of Six for the protection of labor, which is now the first sentence of Section 5(2)(f), was intended to preserve the Commission's discretion to apply the principles of the Washington Agreement.

Mr. Harrison said:

"Now, we realize that to the extent that there are unifications made and the extent that they can be shown to be in the public interest, railroad labor will be adversely affected so we say that the Interstate Commerce Commission shall have the authority and that is in the report to provide for reasonable provisions for the protection of labor. The Commission now has that authority, but it is disputed by the railroads. The Committee of Six agrees that labor shall be protected in those measures authorized by the Commission.

"In the report of the Committee of Six we do not undertake to lay down the specific, detailed protection that should be accorded labor by the Commission, but we were very much of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the employees' labor unions. It provides a schedule of benefits and protections.

"So to that extent I think the interest of labor will be protected, the public interest will be protected, and

²⁸ The adjustment referred to was the Washington Agreement.

the opportunity to eliminate some bad situations in the railroad transportation machine will be available."²⁹

The hearings before the Senate Committee were concluded on April 14, 1939. On May 16, 1939, the Committee submitted its report to the Senate explaining therein the changes made and the unification and consolidation provisions of the bill. The report states that among the important changes accomplished by Section 49 of the bill was a provision:

"that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of Section 49, a fair and equitable arrangement to protect the interests of the employees affected.

"The provisions referred to immediately above were included pursuant to the recommendations of the report of the Committee of Six (p. 30). There are no similar provisions in existing law."³⁰

The bill was debated on the floor of the Senate from May 22nd to May 25, 1939, when it passed by a vote of 70-6.³¹ Section 49(3)(c) of the bill was left unaltered and now constitutes the first sentence of Section 5(2)(f) of the Interstate Commerce Act.

C. House Proceedings

In March 1939, Chairman Lea of the House Committee on Interstate Commerce introduced a bill (H.R. 4862) which was similar to S. 2009 with respect to the merger provisions. The House hearings on the bill were conducted from January 24, 1939, to March 30, 1939. At these hearings Mr. Gray, one of the management members of the Committee

²⁹ Hearings before the Committee of Interstate Commerce, U. S. Senate, 76th Cong., 1st sess., on S. 1310, S. 2016, S. 1869, and S. 2009, p. 34, hereafter referred to as "Senate Hearings".

³⁰ Sen. Rep. No. 433, 76th Cong., 1st Sess., pp. 28-29.

³¹ 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6158.

of Six, said there was no disagreement whatever about protecting employees affected by consolidations and mergers, and that they had "a basis for compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination."³² (Emphasis supplied.)

Mr. Harrison told the House Committee of the provisions of the Washington Agreement, then in force three years, and which "has worked out very satisfactorily"³³ and added: "It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principles that the men are entitled to protection."³⁴

In short, the testimony of Mr. Gray and Mr. Harrison means that the carriers and labor had in good faith entered into the Washington Agreement, which extended compensation protection to displaced and dismissed employees for a period of five years from the date that the adverse effects occurred. This agreement had been applied in substance by the Commission in the case which ultimately received this Court's approval, *United States v. Lowden*, 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208, and it was the sense of the Committee of Six that the proposed employee provision would insure compensation protection for labor by making mandatory a fair and equitable arrangement by the Commission but leaving as discretionary the exact nature of the protection to be afforded. By incorporating this language into the statute, Congress adopted the attitude of the Committee, i.e., that here was a non-controversial matter germane to the purposes of the statute which should be included without further debate.

³² House Hearings, pp. 184, 193-194.

³³ *Id.* at p. 260.

³⁴ *Ibid.*

On July 18, 1939, the House Committee reported its own bill by striking everything in S. 2009 after the enacting clause. Instead of codifying the Act, as had the Senate bill, the House bill amended certain existing provisions of law and added a part III dealing with water carriers. With respect to the employee provision of the merger section, the House adopted the identical language of the Senate bill.³⁵

The bill thus reported was debated in the House beginning July 21, 1939.

At this point, therefore, we find most of railway labor and all of railway management in agreement on the type of provision which should be inserted into the law for the protection of the interests of the employees affected by mergers or consolidations. At this time, also, there was concurrence in this view by the United States Senate and by the House Committee which had considered the subject. The record clearly indicates that the only protection which was envisioned at this point was protection similar to that afforded by the provisions of the Washington Agreement—protection limited to *financial compensation* only.

Three days after the beginning of debate on the House Committee bill there was injected a concept of employee protection not theretofore considered by either the House or the Senate in hearing or debate—the concept of *employment* protection.

On July 23, 1939, Representative Harrington of Iowa rose and offered an amendment which, in his words, would protect "the railroad worker against any unemployment or any impairment of employment rights as a result of consolidations."³⁶ Since it was proposed as an amendment to a bill which already had been reported out of committee it

³⁵ Explained in H.R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

³⁶ 84 Cong. Rec., Part 9, 76th Cong., 1st Sess., p. 9883.

was never the subject of hearings and its entire history and intended scope is to be found in the debates on the floor of the House.

Harrington Amendment

The suggested amendment of Mr. Harrington read as follows:

"Provided however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."³⁷

Two things were immediately apparent upon consideration of this proposed amendment. First, it had an entirely different objective than the provision for employee protection passed by the Senate and recommended by the House Committee since it sought to prohibit *permanently* the displacement or dismissal of employees as a result of mergers and consolidations rather than to afford them financial compensation after displacement or dismissal had taken place as provided by the terms of the Washington Agreement.³⁸ Second, it very definitely sought to *add* to the proposal advocated by the Committee of Six as well as by the Senate and House Committee. Had the amendment as originally proposed been adopted as a part of the finally enacted statute, no consolidations could have been effected thereunder which would have resulted in displacement or dismissal of employees. It would, therefore, have been necessary to keep all employees of the consolidating carriers in their jobs until such time as the process of natural attrition reduced their number to the level needed for a permanent working force, and further the amendment would have *prohibited displacement* from one position of employment to a position of less compensation. In short,

³⁷ *Id.* at pp. 9881, 9882.

³⁸ Such adverse effect being a necessary prerequisite to the operation of the Agreement.

it was the object of this amendment to place a permanent "freeze" on railroad employment. This purpose obviously differed completely from that theretofore expressed.

The Harrington Amendment was adopted by the House and the bill passed on July 26, 1939. On July 29, the bill was sent to conference.

Regardless of the merits or demerits of the Harrington proposal, it is clear that its purpose and effect were thoroughly understood. While the bill was in conference, the Legislative Committee of the Interstate Commerce Commission sent a special communication to Congress which evidenced the Commission's complete understanding of the amendment but which condemned it in principle in the following language:

*"As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."*²² (Emphasis supplied.)

D. First Conference Report

While the bill was pending before the Conference Committee, word apparently got out that the conferees were going to strike the Harrington Amendment. When this word reached the House, 275 members signed a petition

²² I.C.C. Report of January 29, 1940, p. 67.

addressed to the House conferees requesting that they not permit the Amendment to be stricken."⁸⁶

On April 26, 1940, the Conference Committee reported out S. 2009. It eliminated all changes made by the Senate and House in the consolidation provisions of Section 5. The effect of this was to retain the provisions of Section 5 and Section 213 as then contained in the Interstate Commerce Act. With respect to the elimination of all mandatory employee protection from the bill the Conference Committee made the observation that "the elimination of a consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might have otherwise resulted from the provisions."⁸⁷

The reason for this observation bears explanation. In the debate on the floor of the House it was established that the House conferees felt they were following the desires of the sponsors of the Harrington Amendment in eliminating the consolidation features of the bill and that such elimination would be a satisfactory substitute for the Harrington Amendment as originally proposed.

Mr. Welverton, one of the conferee managers on the part of the House and an opponent of the Harrington Amendment, concisely relates the history of the legislation leading up to the elimination of the consolidation section as follows:⁸⁸

"I will first direct your attention to the consolidation provisions of the bill, which included the Harrington amendment. The Senate bill did not contain the latter amendment nor any provision that approached it in similarity. Thus it was directly in dispute between the two Houses. After long and careful consideration of the matter by the conferees, it was decided that the

⁸⁶ 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., pp. 5867-5868.

⁸⁷ H.R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

⁸⁸ 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., pp. 5878-5881.

best possible manner to deal with the controversial amendment was to strike out all reference to consolidations, mergers, and so forth, in the bill, and thereby remove the cause of the fear of *wholesale dismissals that the Harrington amendment sought to protect railroad employees against.*

"Both the original House and the Senate bills, as reported by the respective committees, contained provisions which were thought to be sufficient to protect employees from dismissal. Each of the bills clearly and explicitly laid a duty upon the Interstate Commerce Commission to protect the employees by the following provision:

'The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interest of the employees affected.'

"This provision was suggested by the committee of six appointed by the President, consisting of three representatives of railroad management and three representatives of the railroad brotherhoods. The Committees adopted the language suggested by them. In doing so we thought we had provided reasonable safety and security for railroad employees against unwarranted dismissals resulting from railroad consolidation. In this view we had the unqualified support of 20 of the 21 railroad brotherhoods. They represented 92% of railroad labor. The Brotherhood of Railroad Trainmen, during the committee hearings, requested that all reference to consolidations be left out of the bill and that the law be permitted to remain as it was under the existing consolidation law and as it is now in the Interstate Commerce Act. This Brotherhood was evidently of the opinion that the rights of labor in case of consolidations, mergers, and so forth, were protected by the terms of the so-called Washington agreement that had been entered into by all of the 21 railroad brotherhoods with the management of most of the railroads of the country. This agreement was then and still is in force without any action by Congress. Believing that we were justified in accepting the viewpoint of 92% of railroad

labor, we reported the bill to the House with the consolidation provisions and with the language *that would guarantee to railroad labor the continuance of the protection gained by the Washington agreement* and also the possibility of gaining further rights by collective bargaining or by action of the Interstate Commerce Commission.

"When the bill came to the floor of this House an amendment to the consolidation section was offered by the gentleman from Iowa [Mr. Harrington]. This amendment was offered at the suggestion of the Brotherhood of Railroad Trainmen, which had requested at the committee hearings the elimination of the entire consolidation section. At no time, either in the Senate or House Hearings, had any such amendment as the Harrington amendment been offered or advocated by that or any other brotherhood. The most that the Brotherhood of Railroad Trainmen had ever suggested was that the old section be removed. And yet, now that the conferees have done what they had requested, they come before the House through their spokesman and object to what we have done.

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"More than 76% of railroad labor has repudiated the viewpoint of those who seek recommitment and are actively supporting the bill."

[Herein follows a statement against recommitment by 15 of the 22 railroad Brotherhoods representing approximately 850,000 employees.]

"Before closing my remarks on the subject of railroad employment, I wish to bring to your attention and emphasize the fact that the conferees have done nothing in this bill that directly or indirectly will harm, disturb or deal unjustly with railroad labor . . .

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"There is no justification for any Member of this House interested in railroad workers to vote against S. 2009." (Emphasis supplied.)

The House of Representatives, however, refused to accept S. 2009 as reported out of the Conference Committee. After

vigorous debate, the bill was recommitted with instructions, among others, that the *Harrington Amendment* be insisted upon by the House conferees. As recommitted the wording of the Harrington Amendment was modified to provide that the Interstate Commerce Commission must include in any order authorizing the consummation of transactions under Section 5:

"terms and conditions providing that such transactions will not result in employees of said carrier being in a worse position with respect to their employment." "

The question that immediately presents itself is whether this language was intended to have the same effect as the original language found in the Harrington Amendment. The question is crucial in interpreting this provision as it is this language, limited in its operation to four years, which eventually became law as the second sentence of Section 5(2)(f).

The answer to the question is found in the comments of all members of the House who spoke in support of the Wadsworth motion to recommit and in the answer of Mr. Harrington himself to certain fears expressed by Mr. Lea who had opposed the original Amendment and opposed the motion to recommit. *No member* of the House at any time expressed a belief that the modified language eliminated preservation of employment rights as distinguished from compensation benefits from the scope of the Amendment.

Representative Warren who supported the Harrington Amendment and Wadsworth's motion to recommit made the following statement on the motion:

"Two hundred seventy-five Members of this House solemnly petitioned the conferees [during the first conference] to retain the Harrington Amendment in the bill. Why was it left out [of the first conference report]? It was left out so the railroads could continue their policy of making jobless some of the finest labor in the world. *If those of you who signed the petition meant what you*

⁴³ 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5886.

said, then the only way to give expression to it is to vote to recommit.

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"If the House, Mr. Speaker, wishes to write its bill and wishes its will to be upheld rather than accept a new measure, written by 12 conferees, *where its will was ignored*, then you will vote to recommit this conference report with instructions to *place back in it* what you, by overwhelming majorities, had previously voted for. [Applause].

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"The safest vote, Mr. Speaker, for every Member of this House today is to vote to recommit this bill under the motion offered by the gentleman from New York [Mr. Wadsworth]." ⁴⁴ (Emphasis supplied.)

Representative Thomas made the following statement on the motion to recommit:⁴⁵

"Mr. Speaker, I am going to vote to recommit this bill with the hope that it can and will be perfected. The welfare and prosperity of my district depends, to a large degree, upon *continuous employment* for the many thousands of railroad workers who live there and upon the continued flow of agricultural products that are raised in the State of Texas, through the city of Houston.

"So without [sic] ⁴⁶ the Harrington Amendment to protect those thousands of railroad workers, and without [sic] ⁴⁷ the amendment of a distinguished colleague, the gentleman from Texas [Mr. Jones,], Chairman of the Committee on Agriculture, I am going to vote to recommit." (Emphasis supplied).

⁴⁴ 86 Cong. Rec. 5867-5868.

⁴⁵ 86 Cong. Rec. 5883-5884.

⁴⁶ This appears to be a typographical error identical to that found in the Whitney letter quoted below, at pages 54 and 55, since Rep. Thomas would hardly have voted in support of a motion which did not contain the protection which he had stated his constituents so vitally needed.

Mr. Harrington, prior to stating the effect of the modified language as it appeared in the Wadsworth amendment, made this statement to the Members of the House:"

"Two hundred seventy-five Members said when you signed that petition [to the conferees during the first conference requesting them to retain the Harrington Amendment] that you believed as I do, that labor should have protection. If you meant what you said then, now is the time to show these men that you did, and vote to recommit, . . ."

The foregoing quotations demonstrate conclusively that those who spoke in support of recommitment clearly understood that the term "worse position with respect to their employment" contained in the Wadsworth motion had the identical effect of the original language of the Harrington Amendment.

It should be pointed out that Representatives Lea and Wolverton were outspoken opponents of the original Harrington Amendment and the Wadsworth motion to recommit.⁴⁷ Representative Lea feared that the Wadsworth motion had added two new elements to the Harrington Amendment. He correctly thought that the Wadsworth motion would extend employment protection to railroad abandonments as well as consolidations and mergers. But he erroneously feared that the motion would give employees a choice of active employment or lifetime compensatory support if they decided not to continue in active employment.

This fear was twice expressed by Representative Lea in speaking against the Wadsworth motion. It first appears in an extension of Mr. Lea's remarks found in the Appendix to the Congressional Record of May 3, 1940, as follows:⁴⁸

⁴⁷ 86 Cong. Rec. 5869.

⁴⁸ In fact, of the 7 House conferees only one (Rep. Crosser) voted for Wadsworth's motion. The others voted against it. 86 Cong. Rec. 5886, 5887.

⁴⁹ 86 Cong. Rec., Appendix 2684.

"In its order approving any such transaction, the Commission shall include conditions providing that such transaction 'will not result in employees of said carrier or carriers being in a worse position with respect to their employment.'

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"If the third provision above referred to would require the Commission in every case of consolidation or abandonment to include terms and conditions providing that such transaction will not result in employees 'being in a worse position with respect to their employment,' this provision would largely nullify the discretion given the Commission as to the first two proposals.⁵⁰ Under this provision, the Commission must, without limit of time, require that an employee for whom the employer no longer has any need *must be retained* at the expense of the employer *on a working salary basis or on a compensation basis* totally equaling that which the employee received while performing useful service for the carrier.

"This is a novel provision probably not heretofore written into any law in the United States. It would, by Federal law, impose upon an employer the duty of indefinite if not *lifetime support* of employees for whom he no longer has a job." (Emphasis supplied.)

Mr. Lea repeated his fears on the floor of the House on May 9, 1940:⁵¹

"This amendment goes beyond the Harrington Amendment. It includes abandonments, in case of substitute railroad service, and then it goes further and provides that these consolidations shall not be approved if they will result in employees being in a worse condition with respect to employment. That provision nullifies all the discretion given the Commission. It makes that condition of the employee the dominating

⁵⁰ The discretion referred to is that provided by the requirement of a "fair and equitable arrangement for employees." The proposals referred to are consolidation proceedings and abandonment proceedings.

⁵¹ 86 Cong. Rec. 5864-5865.

consideration; if an employee is in any worse condition the consolidation cannot be approved.

"There is no time limit in which an employer is to maintain those men in a condition equal to that under which they were discharged."

That these fears were unfounded was made eminently clear by Mr. Harrington who confirmed the views contained in a letter from which he quoted at length and which had been addressed to Mr. Lea from Mr. Whitney, President of the Brotherhood of Railroad Trainmen, who had vigorously supported the cause of "employment protection" as found in the Harrington Amendment and the Wadsworth motion to recommit. The letter read as follows:²²

"Your address, as reported in the daily Congressional Record of May 3, suggests that *your conception of the labor-protection provision is entirely erroneous*. You state that such a legal provision would have the effect of imposing 'on the employer the duty of indefinite if not a lifetime support of employees for whom he no longer has a job.' As a practical matter you must know that it is not so. Average railroad consolidations eliminate 20 to 25 percent of the employees. Without [sic]²³ the labor-protection provision these employees youngest in point of service will be spared that fate, and the eliminations would come from the other end of the seniority list, as deaths, resignations, and retirements occurred. Such attrition from deaths, resignations, and retirements, for all railroad employees now average upward of 5 percent per year; but for train-service employees who are most severely affected by consolidations, the attrition rate is between 2.5 and 3.5 per-

²² 86 Cong. Rec. 5870.

²³ The word "without" here is a typographical error. This conclusion is confirmed by an examination of a copy of the original letter in the files of the Brotherhood of Railroad Trainmen and by an examination of the "Railroad Trainman" issue of June 1940, which contains a reprint of the letter. Both the copy and the reprint in the "Railroad Trainman" indicate that the word used by Mr. Whitney was "with".

cent. Thus, on the whole, employee eliminations from consolidations would be gradually and humanely absorbed within a short period of time, especially with an increase in railroad business which is claimed if S. 2009 is enacted into law. The only way in which you could be correct in your reference to lifetime support is to assume that the lifetime of railroad workers will be short indeed. Although we railroad employees feel somewhat hardier than that, it may be true that if you force tens of thousands of us into the bread line you will so shorten our span of life."

"You erroneously refer to the proposed labor-protection provision as a 'dismissal wage' proposition. The dismissal wage is only another attempt to achieve national prosperity by providing meager compensation for nonproduction. Before concluding that such an arrangement is equitable, ask yourself if you would be willing to forego pursuit of your life's calling for a mere 60 percent of your present salary for a few months. Railroad employees want honest pay for honest work; that is what the labor protection proposal offers. A dismissal wage proposition proposes to buy up, at bankrupt prices, the jobs of needy workers." (Emphasis supplied)

Subsequent to quotation from this letter, Mr. Harrington again explained the meaning of the modified language found in the Wadsworth motion in a clear and unequivocal statement which was unquestioned by any member of the House:

"The motion to recommit, which will shortly be made by . . . [Mr. Wadsworth], will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment. . . .

"The labor protective provision, which so many of us favor, is beneficial to all railroad employees. It protects the public against the slow death and the withering of entire communities, that always accompanies railroad consolidations. It is good for the railroad industry, because it will stay the hand of railroad

financial interests which, instead of squeezing the water out of the capitalization of that industry, are bent upon reducing the physical plant of our great railroads, so necessary in time of war or in time of peace and prosperity . . . *By adoption of this provision in the transportation bill, the government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers. But this provision also contains a clause that permits the industry, through the process of collective bargaining, to work out its problems in a democratic manner.*

"Without this labor protective provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. With this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur. If S. 2009 will bring to the railroad industry the prosperity its supporters contend for it, then the natural attrition will shortly have absorbed the employees that otherwise would be eliminated if this Congress does not now deal with this problem." (Emphasis supplied.)

Only one other member of the House, Rep. Wolverton, may have expressed any concern⁵⁵ that the Wadsworth motion did not provide the same employee protection as had the original language of the Harrington Amendment. Representative Wolverton's remark came about in the following manner: Representative Bulwinkle, a member of the Conference Committee, was discussing the Wadsworth motion and was opposed to it. Mr. Wadsworth had just asked him whether recommitment would kill the bill. The following colloquy then took place:⁵⁶

⁵⁵ *Id.* at 5871.

⁵⁶ We say "may" have expressed concern because it is not at all clear whether Mr. Wolverton was speaking about the employee protection features of the Wadsworth motion or the fact that it extended protection to railroad abandonment, an area not therefore subject to the provisions of the bill.

⁵⁷ 86 Cong. Rec. 5885.

Mr. Bulwinkle: "Oh, no; but I am saying that you can do practically nothing at all in the way of doing the things these other gentlemen are talking about."

Mr. Wolverton: "Will the gentleman make clear that the motion to recommit which it has been suggested will be made by the gentleman from New York [Mr. Wadsworth] does not contain the Harrington Amendment?"

Mr. Bulwinkle: "*I did not know that. I thought it would contain the Harrington Amendment.*"

Mr. Wolverton: "It is an entirely different amendment. It seems as if the Harrington Amendment proponents have made an additional suggestion."

Mr. Bulwinkle: "Now we have a new Harrington Amendment today. What was wrong with the original?" (Emphasis supplied.)

Representative Bulwinkle obviously thought that the Harrington Amendment remained in the motion to recommit as did all other Congressmen who *supported* the motion for recommitment and whose views are expressed in the Congressional Record. As a matter of fact, Rep. Wolverton himself later recognized that the Wadsworth motion contained the Harrington Amendment for the Congressional Record discloses that he made the following statement with regard to the second conference report which became Section 5(2)(f):⁵⁷

"We [the conferees] have been able to obtain from the Senate conferees an agreement that *sustains the principle*, if not the exact language of the House, of the Jones [agricultural] and the Harrington amendments. This agreement as presented in *our report does not destroy the purpose or intent of either amendment*. And it is our understanding that the language agreed upon which in no way materially changes the Jones amendment and only slightly modifies the Harrington amendment, *is not opposed by those interested in having these amendments written into the bill.*" (Emphasis supplied)

⁵⁷ 86 Cong. Rec. 10189.

Little more could be asked by way of clarity of Congressional intent. The author of the provision and all who spoke in its support stated that the modified language had precisely the same meaning as the original language. No one challenged these statements as erroneous. Nor was any challenge offered regarding the substantive effect of the modified language as stated by Rep. Harrington or the others who spoke in its support. Only Representative Lea expressed doubts, but his doubts were not to the effect that the modified language eliminated employment protection, to the contrary, Mr. Lea feared the modified language *added* the requirement that employees "must be retained . . . on a working salary basis or on a compensation basis" which would "impose upon an employer the duty of indefinite if not lifetime support" of those employees for whom there was no work.

But the authors and supporters of the modification unequivocally stated in open debate on the floor of the House that Mr. Lea's fears were unfounded as his "conception of the [modified] labor-protection provision is entirely erroneous"; that the modified language was "designed to accomplish the purposes intended to be accomplished" by the original language; and that under the modified language "job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur," in other words, that "natural attrition will shortly have absorbed the employees that otherwise would be eliminated." Mr. Lea did not take issue further with these corrective statements. Perhaps he felt that as Chairman of the House Conferees he could provide against them in conference if the motion to recommit was approved. Because of the fears expressed by Representative Lea and the rather vague objection of Representative Wolverton, it may be important to note here that the Harrington Amendment expanded the scope of its coverage by the

addition of the following language in the Wadsworth motion to recommit:

"(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." ⁵⁸

In other words, the Harrington Amendment now sought to add to the list of transactions subject to employee protection "the substitution and use of another means of transportation for rail transportation proposed to be abandoned." Moreover, as is demonstrated by the above-quoted statement of Mr. Harrington, the modified language preserved without change the concept of employment protection. This latter provision was thus the same proposal to which the Senate Committee, the Conference Committee, and the Interstate Commerce Commission had already objected.

Prior to the vote on the motion to recommit Mr. Harrington succinctly stated his reasons for supporting the motion:

"Mr. Speaker, when I offered my amendment last July, I did so because there was no protection in the bill for the employees in the event of consolidation, nor is there adequate protection for them in the present law, and it is for this reason, and this reason only, that I believe you should vote to recommit the bill, with instructions to the managers on the part of the House that they insist that the modified language for labor protection be placed in the bill together with the

⁵⁸ *Id.* at 5886.

change in the present law which will contain the consolidations sections requested by the railroads.

"There is not a railroad organization within the country which does not believe they should have *further protection* and those who have asked you to vote against recommitment are only doing so because they too have been misled into believing that recommitment will kill the bill."⁸⁹ (Emphasis supplied.)

* On the same day, May 9, 1940, the House by a vote of 209 to 182 adopted Mr. Wadsworth's motion to recommit directing its conferees to include, among other things, the substantively unrevised Harrington Amendment.⁹⁰

E. Second Conference Report

Again the matter was considered by the conferees, and on August 7, 1940, the conference report was submitted to the respective houses.⁹¹ The modified language was adopted by the conferees but was limited to four years' operation. The language agreed upon by the conferees now constitutes the provisions of Section 5(2)(f).

The conference report clearly explains the reasons for the time limitation placed on the Harrington Amendment:

"The House amendment included a proviso (the Harrington amendment) *prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provision in the Senate bill.*

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"The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the trans-

⁸⁹ *Id.* at 5869.

⁹⁰ *Id.* at 5886.

⁹¹ H.R. Rep. No. 2832, 76th Cong., 3d Sess.

action shall not result in the employees being in a worse position with respect to their employment. The conference agreement, however, qualifies *this provision by confining its operation to a period of four years* from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.”

“In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation.”⁶² (Emphasis supplied.)

It is clear from the explanation of Section 5(2)(f) by the Conference Committee that in the minds of the conferees

⁶² Conf. Report to accompany S. 2009, H. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68-69; reprinted in 86 Cong. Rec. 10167, August 12, 1940. The Commission relied heavily on the fact that the report uses the phrase “benefits to employees will be required to be paid” as indicating that only compensation protection was intended. Such an interpretation does not square with the remainder of the report quoted above nor with the fact that “employment protection” was the manifest object of the House and a departure from that object by its conferees would have had to take the form of something more definite than such a vague reference if intended to be effective. It is probable that this phrase merely evidences the continuing fears of Mr. Lea that employees might be paid compensation for life even though he recognized that they “must be retained on a working salary basis” in service of the railroad. The conference report merely limits the mandatory continuation of the benefits of the provision (retention on a working salary basis) to a period of four years.

the second sentence of Section 5(2)(f) was intended to provide mandatory employment protection limited to four years. The first sentence was designed to require a fair and equitable arrangement by the Commission for the protection of employees affected by transactions authorized under Section 5. It was mandatory only in that sense. It was discretionary in the sense that the nature and extent of the protection to be afforded was for the Commission to decide. No limitation in point of the type of protection or in point of time is suggested. On the other hand, the second sentence deals with a specific minimum type of protection, preserving to the employees their employment with the carriers concerned but limiting that particular protection to a period of four years from the effective date of the Commission's order. The *only* limitation imposed upon the employment protection amendment introduced by Mr. Harrington was the period of time it was to be effective.

The debate on the floor of the House on the adoption of the second conference report, particularly the statements made by House members of the Conference Committee, provide conclusive support for these conclusions. In referring to these debates, it is important to note that the term "Harrington Amendment" was synonymous with "employment protection" in the minds of the members of the House—no one intimated otherwise.

In explaining the intention of the conference committee to the House, Representative Lea, Chairman of the House Conferees, stated: "

"The substitute that we bring in here provides two additional things. First there is a limitation on the operation of the Harrington Amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees

²² 86 Cong. Rec., Part 9, 76th Cong., 3rd Sess., p. 10178.

themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference report.

"There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so that the railroad company will not be required to maintain him *in no worse condition as to his employment* for any longer period than he worked before the consolidation occurred.

"We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. *We take nothing from labor by this agreement.* We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands." (Emphasis supplied)

Rep. Lea here states that two, and only two limitations were placed upon the Harrington Amendment by the Conference Committee and both of these restrictions related to the time during which the substantive provisions of the amendment would be effective.

Identically the same views as to the intent and full force of the second sentence of the section were expressed by Representative Wolverton, another member of the Conference Committee:⁶⁴

"Now, as to the Harrington amendment,"⁶⁵ the conferees have adopted *practically the same language as originally adopted by the House*, but with a modification as to the length of time the provisions are to be

⁶⁴ Id. at p. 10189.

⁶⁵ Which Rep. Wolverton had opposed.

effective. This amendment, as you are all possibly aware, was not in the Senate bill in any form whatsoever. Objection was made that the amendment, in the language adopted by the House, would *guarantee for life the employment of any and all employees of railroads participating in a consolidation or merger of their lines* even though the employee's service may have been as little as a month, or even less; and, furthermore, if there was no work for them as a result of the consolidation or merger, yet their compensation would continue upon the same basis as at the time of consolidation and until death or their voluntary separation from the service of the company.

"In fact there were some who were of the opinion that it *froze every job* for the employee in service at the time of consolidation but also *froze perpetually every job* which existed at the time of the consolidation or merger. So, even death or resignation of the employee did not end the job. It would descend to someone else even though not in the employ of the railroad at the time of the consolidation or merger. And, then there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.

"I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment. It was recognized that the real intent of the sponsors was to save railroad employees *from being suddenly thrust out of employment as the result of any consolidation or merger or entered into*. The Committee on Interstate and Foreign Commerce of this House is presenting its original bill used language which it thought accomplished that purpose. We thought we were giving legislation assurance of at least a continuance of the Washington agreement which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce

Commission as a condition precedent for its approval of the Rock Island case, *United States v. Lowden* (308 U.S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future. Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining.

"The conferees have struggled long and hard to agree upon language which would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that *it is acceptable to all* who are to be affected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers *protection against sudden dismissal and financial assistance* that is not enjoyed by workers in any other industry. And this is

true without any exception or qualification whatsoever."⁸⁶ (Emphasis supplied.)

The foregoing explanations by an avowed opponents of the Harrington Amendment establishes beyond question that the intention of Congress in writing the second sentence of Section 5(2)(f) was to *protect the employment* of all employees of carriers involved in proceedings arising under Section 5(2) *for a period of at least four years* from the date of the Commission order approving the transaction. This protection was intended to be the minimum protection afforded by the statute.

The statements by Congressmen Lea and Wolverton were not challenged or contradicted by any member of the committee. They support unequivocally the express language contained in the statute and refute with equal strength any construction which would limit protection afforded by that provision solely to compensation.

On August 30, 1940, the bill was submitted to the Senate⁸⁷ and again debated, and after debate, which only briefly concerned the Harrington Amendment, the bill was passed on September 9, 1940.⁸⁸

Immediately after the Senate adopted the Conference Report containing Section 5(2)(f) as we now know it, Senator Wheeler, the sponsor of the 1940 Act in the Senate, asked and was granted unanimous consent "to insert in the *Record* a statement giving some explanations of certain provisions which were changed [from the original S.

⁸⁶ Rep. Wolverton apparently attempts to equate "employment" protection with "compensation" protection but nowhere suggests that "employment" protection was removed by the conferees. Rather, Mr. Wolverton's statement confirms the fact that the "employment protection" character of the amendment remains unchanged.

⁸⁷ 86 Cong. Rec., Part 10, 76th Cong., 3rd Sess., p. 11269.

⁸⁸ Id. at p. 11766.

2009].” He stated that he desired to have these explanations in the *Record* because “

“I feel they would be helpful to the Interstate Commerce Commission in *interpreting* the various provisions of the Act.” (Emphasis supplied)

With regard to Section 5(2)(f), this explanatory statement simply read: ⁷⁰

“Present law is also amended *by inclusion of the Harrington Amendment*, protecting employees in the event of consolidations . . .” (Emphasis supplied)

On September 18, 1940, the bill was signed by the President.

The legislative history of Section 5(2)(f) is lengthy because of the struggle over the Harrington Amendment in the House. It is important, however, because it presents a conclusive demonstration that the provisions of Section 5(2)(f) were at all times a subject of controversy only as between two opposing labor groups, one insisting that the statute should require that no employee could be placed in a worse position with respect to his employment as a result of the transactions approved under Section 5(2) and the other satisfied that the measure of protection could be left to the Commission's judgment and could take the form of “compensation protection.” A compromise resulted. That compromise was never in any sense a subtraction from the original Harrington Amendment except as to the length of time in which it was to be effective.

We submit that the legislative history of this provision precludes any construction which would provide less than four-year employment protection to every employee of every carrier affected by the approval of a transaction approved under Section 5(2).

⁶⁹ Ibid.

⁷⁰ Id. at 11768.

In reviewing legislative history, this Court has cautioned:

"The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Mastro Plastics Corp. et al. v. N.L.R.B.*, 350 U.S. 270, 288n, 76 S.Ct. 349, 100 L.Ed. 309; *Schwegmann Bros v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 71 S.Ct. 745, 95 L.Ed. 1035; see also *S. H. Camp & Co. v. N.L.R.B.*, (6th Cir.) 160 F.2d 519, 521 and cases cited therein.

That is what has been done here and the words of the author and sponsors of the Harrington Amendment demonstrate conclusively that for a period of four years from the Commission's order all economies to be made at the expense of employees must come from the "other end of the seniority list, as deaths, resignations and retirements occur" through "natural attrition."¹¹

If any further evidence be desired regarding Congress' view of the type of protection it afforded by enactment of the Harrington Amendment, it can be found in the legislative history of a statute enacted three years later. The Communications Act of 1943, 47 U.S.C. § 222(f), 57 Stat. 5, was enacted for the same reason as Section 5(2) of the Interstate Commerce Act, i.e., to aid a financially floundering industry, in that case the telegraph industry. It was enacted to permit the merger of the Postal Telegraph Company into the Western Union Company. At that time those companies all but constituted the telegraph industry in this country.

Congress intended, and eventually did provide for the protection of the employees in that industry. Section 222

¹¹ Ironically, Representative Harrington voted against passage of the second conference report. He did not take this position because he disagreed with the time limitation placed upon the employment protection in the report but only because the conferees had eliminated railroad abandonments from its purview. 86 Cong. Rec. 10187, 10192.

(f)(1) provides that employees of such merged telegraph carriers who were employed on March 1, 1941, must be employed by the carrier resulting from the merger for not less than four years and that during such period "no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry." Subsection (7) further provides that no such employee "shall, without his consent, have his compensation reduced, or * * * be discharged or furloughed during the four-year period."

At first glance it is clear that this employment provision went well beyond Section 5(2)(f) in two respects. It did not limit employment protection to the length of an employees' previous service if less than four years and it protected an employee from discharge or furlough *for any reason* and not solely for reasons connected with mergers as had Section 5(2)(f). In fact, not even the provisions of the Emergency Railroad Transportation Act of 1933 went so far. Certain members of the Senate recognized this fact and opposed such an extension of protection.

It is clear, however, that the Senate was well aware of just how far it had gone in enacting the Harrington Amendment. A statement of Senator Hawks which was read by Senator Taft on the floor of the Senate during the debate on Section 222(f) points this out. Senator Hawks' statement as read by Senator Taft is as follows:⁷²

"The provision protecting employees of any merged company that occurs under this act should not be any more exacting on the merged companies than the provisions contained in the amendment of 1940 to the Interstate Commerce Act authorizing the consolidation and merger of railroads. The merged company should not be compelled to keep employees, who under ordinary conditions, could be dismissed by either of the companies merging. The purpose of the act should

⁷² 89 Cong. Rec., Part 1, 78th Cong., 1st Sess., p. 1195.

be to protect only employees who might be discharged as the result of the merger itself. . . . I do not believe the protection should go to the point of guaranteeing employment to those who would have been released in any event regardless of the merger." (Emphasis supplied.)

Section 5(2)(f) did not protect employees from being discharged under "ordinary conditions" and, in the opinion of Senator Hawks and others, neither should the Communications Act of 1943. If anyone opposing the employee protection feature of the 1943 Act had for a moment believed that Section 5(2)(f) did not protect employees from furloughs or dismissals resulting from the merger it seems reasonable to assume that they would have used that view to oppose the type of provision with which they were faced. It is of significance that they did not.

V

EXPLICIT RECOGNITION OF THE EFFECT OF THE SECOND SENTENCE OF SECTION 5(2)(f) BY THIS COURT

On March 27, 1950, this Court issued its decision in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721. This case is important to a consideration of the primary issue now before this Court because of the thorough review given the legislative history of Section 5(2)(f) and the Court's clear indication of its view of the intent and meaning of the Harrington Amendment as it appears in the second sentence of that provision.

This Court reviewed the legislative history of Section 5(2)(f) with particular reference to its first two sentences and the power of the Commission to protect employees beyond the "four years" provided in the second sentence. The opinion clearly indicates that the instruction given to the House conferees on recommitment did not change the substance of the Harrington Amendment but merely its

wording.⁷³ In order to demonstrate the Court's thorough familiarity and understanding of the Harrington Amendment, both before and after its modification, we quote from the discussion of that amendment in the opinion (339 U.S. at 151-154):

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidation, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, *threatened to prevent all consolidations to which it related.*

"With the Harrington Amendment in it the bill went to conference. It came out with all provisions relating to consolidations under § 5 eliminated. The House, however, recommitted the bill to conference with instructions to insert a modified form of the first sentence of § 5(2)(f), together with a modified form of the Harrington Amendment. The modification of the first sentence merely extended the original language as to fair and equitable arrangements so as to include abandonments as well as consolidations. The modification of the Harrington Amendment is not now material.

"The second conference reported § 5(2)(f) in the final form in which it was enacted into law. It retained the first sentence in its original language. In the second sentence, however, it included a *substantial change* in the Harrington proposal. *It limited it to the*

⁷³ With regard to the substance of the original Harrington Amendment, the Supreme Court stated as follows (339 U.S. 151, n. 13): "This proposal was not without precedent. In the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, there were many temporary provisions which originally were to expire in 1934 and finally did expire in 1936. Among these was § 7(b). It provided that no employee was to be deprived of employment or be in a worse position with respect to his job [actually 'compensation'] by reason of any action taken pursuant to the authority conferred by the Act. That provision, on a temporary and independent basis, thus co-existed with the permanent amendments which were then made to § 5 of the Interstate Commerce Act, including § 5(4)(b)."

four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order of approval. This clause emphasized the separability of the second sentence, for it provided that 'the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, . . .' than that prescribed. (Emphasis supplied by Court)

"The second sentence thus gave a limited scope to the Harrington Amendment and made it workable by putting a time limit upon its otherwise prohibitory effect. There was no comparable need for such a restriction upon the first sentence. We find, therefore, that the time limit in the second sentence now applies to it and to it alone. As thus limited, that sentence adds a new guarantee of protections to the interests of employees, without restricting the Commission's power to require greater protection as part of a fair and equitable arrangement. This serves the purpose of the sentence to increase rather than to decrease, the protective effect of the paragraph." (Emphasis supplied)

The opinion clearly states that the only change made in the Harrington Amendment, through a "substantial change," merely placed a time limit upon its operation and nothing more:

"The second sentence thus gave a limited scope to the Harrington Amendment and made it workable by putting a time limit upon its otherwise prohibitory effect."

We respectfully submit that no language used by this Court could have been more definitive than that set forth above. If any doubts could exist regarding the Court's view of the express requirements of the second sentence of Section 5(2)(f), they should have been forever put to rest on April 18, 1960, when this Court issued its decision in Case No. 100, October Term, 1959, *The Order of Railroad*

Telegraphers, et al. v. Chicago and North Western R. Co.,
362 U.S. 330, 80 S.Ct. 761, 4 L.Ed. 2d 774.

That case involved a question of whether an addition to a collective bargaining agreement proposed by The Order of Railroad Telegraphers which provided,

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization,"

was a bargainable issue under the provisions of the Railway Labor Act, as amended, 48 Stat. 926, 45 U.S.C. 151, et seq.

The Court held that such a provision was covered by the Railway Labor Act as a bargainable issue under its provisions. As support for its conclusion, the Court said that both the "Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." (362 U.S. at 337.) The Court then relied upon Section 5(2)(f) as follows (362 U.S. 337):

"Where combinations and consolidations of railroads might adversely affect the interest of employees, Congress in the Interstate Commerce Act has expressly required that before approving such consolidations the Interstate Commerce Commission 'shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.' It requires the Commission to do this by including 'terms and conditions' which provide that for a term of years after a consolidation employees shall not be 'in a worse position with respect to their employment' than they would otherwise have been." (Emphasis supplied)

Lest there be any misunderstanding that the Court here interprets Section 5(2)(f) as requiring employment protection and not mere compensation protection, it should be noted that it only was this statement made in support of

the Court's holding that a railway union has the statutory right to bargain with management about provisions in their agreements which would have the effect of stabilizing employment but also that the entire Court fully appreciated the meaning which had been assigned to Section 5(2)(f).

This latter fact is confirmed by reference to the dissenting opinion which disagreed with the Court's conclusions and, in referring to the above-quoted finding of the Court, says (362 U.S. 355):

"... nothing in it [§ 5(2)(f)] authorizes the Commission to freeze existing jobs."

And at 362 U.S. 356-357, the dissenting opinion continues:

"Of the Harrington proviso, this Court said in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, that 'it threatened to prevent all consolidations to which it related [but Congress] made it workable by putting a time limit upon its otherwise prohibitory effect.' 339 U.S. at 151, 153. But Congress actually did more. It eliminated any power to freeze jobs."

The dissent here clearly recognizes the language quoted from the 1950 decision of the Court as interpreting the four year time limit as the *only* limitation or restriction placed upon the otherwise complete and permanent employment protection contemplated by the Harrington Amendment.

The decision in the *Order of Railroad Telegraphers* case involves the question of "stability of employment" under the Railway Labor Act. To support that decision, the Court cited Section 5(2)(f) of the Interstate Commerce Act and, we respectfully submit, in doing so clearly recog-

"It is respectfully submitted that even if the second sentence of Section 5(2)(f) did not *require* employment protection the Commission would have the discretion to provide such protection under the broad power given it by the first sentence of that provision.

nized that Section 5(2)(f) was enacted to preserve employment rights in the railroad industry for a limited period following merger or consolidation authorizations.

Whatever may be said regarding arguments heretofore advanced on this subject, it would now seem to be clear that this Court has specifically interpreted Section 5(2)(f) as requiring the Commission to provide, as a minimum, employment protection for all employees for a period of four years following approval of a merger and if such protection would not protect *all* employees⁷⁵ something more must be provided to insure fair and equitable protection beyond the four-year period.

VI

ANALYSIS OF THE DECISIONS OF THE COMMISSION AND THE DISTRICT COURT

A. The Commission

The Commission's decision in this case relies upon cases involving job abolishments and job transfers which it decided in 1941, 1942 and 1944. (R. 20-21.) Those cases were cited in an attempt to demonstrate a long-standing and consistent administrative interpretation of the provisions of Section 5(2)(f). The particular issue which was presented to the Commission by the RLEA in this case and which is now presented to this Court, was never raised and therefore never passed upon by the Commission in the cases which it cited in its report. Even if such issue had been considered and decided by the Commission adversely to plaintiff in 1941, 1942 or 1944 and consistently followed by that agency thereafter, it would not be controlling here.

In *Railway Labor Executives' Association v. United States*, 339 U.S. 142, discussed *supra*, and *Interstate Commerce Commission v. Railway Labor Executives' Associa-*

⁷⁵ As it would not have in the *New Orleans* case or in this case since it is admitted that many employees will not be affected until the fifth year after ICC approval. (R. 112.)

tion, 315 U.S. 373, 62 S. Ct. 717, 86 L. Ed. 904 (1942), both of which involved the Commission's interpretation of its power to impose employee protective conditions, this Court rejected the Commission's "contemporaneous construction."

In their brief to the District Court, the United States and the I.C.C. attached an appendix which listed all reported cases decided by the Commission pursuant to the provisions of Section 5(2). That appendix, in the exact form in which it appeared in the Government's brief, is attached hereto as Appendix A to this brief. It will be noted that the first twenty-one cases reported included no employee protective conditions and it was not until May of 1946 that the Commission recognized its statutory obligation to impose employee protective conditions in every order of approval issued pursuant to Section 5(2). This recognition came after the Commission had decided ninety reported cases. Of those ninety cases, employee protective conditions were imposed in but seven and in those seven the conditions imposed were those agreed to by the parties or suggested by the labor representatives themselves as befitting the particular type of case involved. See *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285, 293-294; *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 252 I.C.C. 49, 64-65; *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 193, 196; *Gulf, M. & D. R. Co. Purchase, Securities*, 261 I.C.C. 405, 434.

No one now questions the requirement of Section 5(2)(f) that the Commission must impose some type of employee protection in every case it decides under this statute. However, the first case in which the Commission recognized this requirement was decided on May 29, 1946, *Chicago & North Western Ry. Co., Merger*, 257 I.C.C. 672; only then did the Commission begin the practice of imposing protective conditions in all cases arising under Section 5(2).

In light of this history, it would seem that the Commission has been unfortunate in its "contemporaneous construction" of at least two requirements of Section 5(2)(f)

and the appellants here submit that if it had ever rendered a positive "contemporaneous construction" of the issue presented here, which is denied, the Commission erred in construing a third requirement of that section.

The Commission concluded its decision by stating that employment protection would violate the National Transportation Policy as enunciated in the Transportation Act of 1940 which is stated as the promotion of "efficient service and [fostering of] sound economic conditions in transportation." [54 Stat. 899] (R. 26.) Such a conclusion is completely unsupportable for two reasons, first, it supersedes the express language of a statute with an administrative agency's interpretation of the general language contained in a policy statement; and second, it ignores the fact that Congress included a complete and indefinite preservation of employment provision in the 1933 Act which was passed "to save certain railroads from bankruptcy and to perpetuate an efficient means of interstate [railroad] transportation in the United States." *Louisville and N. R. Co. v. United States* (N.D. Ill., 1934), 10 F. Supp. 185, 191 (see also page 27, *supra*). It also did precisely the same thing when it passed the Communications Act of 1943, permitting Western Union to take over Postal Telegraph Company, both of which were in extremely bad financial condition.⁷⁸

The Commission's report also referred to *Lowden v. United States*, discussed *supra*, and *Railway Labor Executives' Association v. United States*, *supra*. In referring to this Court's decision in the latter case, it said that "the Court characterized our practice as affording employees 'compensatory protection' and apparently thought it was consistent with the statute. (R. 25-26.) Significantly, the Commission did not refer to that portion of the Court's decision in which it is clearly said that the only limitation which Section 5(2)(f) placed upon the "otherwise unworkable provisions" of the Harrington Amendment was a four-

⁷⁸ 88 Cong. Rec., Part 1, 77th Cong., p. 5419.

year time limitation. The Commission failed to refer to *The Order of Railroad Telegraphers* case, *supra*, in which this Court reiterated its interpretation of Section 5(2)(f) in this respect.

The Commission placed great reliance upon two short colloquies which took place on the floor of the House between Chairman Lea and Representatives Vorys and O'Connor immediately after Mr. Lea had presented to the members of the House his very complete and carefully prepared statement of the intent and effect of the Harrington Amendment as limited by the Conference Committee and which is set forth at pages 63 and 64, *supra*. (R. 23.) These informal colloquies appear to be the only reference in the entire legislative history of Section 5(2)(f) which might be looked to for support of an argument that the mandatory protection provided by Congress was limited to financial compensation only. In order to accept such an argument, however, one must ignore virtually everything else in the Congressional Record relating to this subject. Further, these colloquies are susceptible to an interpretation which supports a Congressional intent to impose *employment* protection.

Mr. Vorys asked if the protective benefits would run for four years from the date of the order "whether or not they [employees] were still employed" and Mr. Lea answered "Yes." Mr. O'Connor then asked if the term "worse position" in the phrase "worse position with respect to employment" meant that an employee's "compensation will be just the same for a period of four years, assuming that he were employed for four years, as it would if no consolidation were effected."

Mr. Lea said that he took "that to be the correct interpretation of those words" and immediately stated:

"Our conference report followed the instructions of the House in that respect. It gives railway labor gen-

erous protection against sudden and long unemployment." ⁷⁷

Reliance upon such short informal statements is untrustworthy at best. For example, Mr. O'Connor's statement could be interpreted as indicating that he knew an employee would have to be continued in the employment of the railroad for a period of four years and was merely interested in determining whether or not, during that time his compensation could be no less than that which he had previously received. Mr. Vorys' question could be interpreted as implying that the "four year" provision required the railroad to maintain jobs for all employees even though there might be little or no work for some of them. In any event, Mr. Lea in his answer to Mr. O'Connor relied upon the instructions given the House conferees and stated that the Conference Report followed the instructions of the House. (See *supra*.)

The Commission also relied upon a statement of Representative Halleck to the effect that Section 5(2)(f) provided only compensation protection. (R. 23-24.) Here again we are confronted with the dangers of reliance upon informal statements of individuals who neither sponsored nor had primary responsibility for carrying out the will of the House because the record shows that Mr. Halleck was possibly the only member of the House of Representatives who thought that the *original* language of the Harrington Amendment provided no more than compensation protection.⁷⁸

The Commission also quotes Representative Wolverton as follows (R. 25):

"... Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sud-

⁷⁷ 86 Cong. Rec. 10178.

⁷⁸ 86 Cong. Rec., Part 9, p. 10187.

den dismissal and *financial assistance* that is not enjoyed by workers in any other industry."

The emphasis is supplied by the Commission. It is to be noted that Mr. Wolverton here refers to "protection against sudden dismissal and financial assistance." The Commission apparently reads this statement as if it said "protection against sudden dismissal *solely by financial assistance.*"

The Commission then reaches the conclusion (R. 26) that imposition of employment protection rather than compensation protection "would not be consistent with the public interest" because "conditions calculated to preserve *unneeded* jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers." (Emphasis supplied)

There are no findings in the Commission's report which support a conclusion that the imposition of employment protection would preserve "unneeded" jobs. To the contrary, the only reference in the report relative to the effect of employment protection is found in the following sentence (R. 19):

"It [the Association] contends that since the only employees which will be affected by the merger are those, estimated by the applicants to be 863 in number, who would refuse to transfer their place of employment and who would have to transfer in order to obtain protection, if their employment were protected instead of their compensation, it would be to the advantage of the applicants if section 5(2) (f) of the act were interpreted as requested by the association." "

" Though perhaps it is of little moment, the record will show that the railroads and not the Association made this claim. (R. 112, 184)

The Commission does not take issue with this contention and, therefore, insofar as the Commission's decision is concerned this is its only finding regarding employee adverse effect: It is based upon Exhibit H-48 (R. 112, 184) and statements by railroad counsel at oral argument that only 863 men would be deprived of their jobs as a result of the merger and these men would be so deprived only because they would refuse (in the carrier's judgment) to accept available jobs at other points on the system *which they would have to accept* under "employment" conditions if they were imposed. In other words, the Commission's decision and the railroad exhibit demonstrate the fact that were employment protection imposed in this case these 863 employees would be transferred to *needed and available* jobs at other points on the Erie-Lackawanna system and if they refused to transfer they would receive no protection whatever. Certainly such a record does not support a gratuitous finding that employment conditions in this case would preserve "unneeded" jobs.

B. The District Court

When appellants presented their case to the District Court they relied upon the interpretation of Section 5(2)(f) set forth in this Court's opinions in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed. 2d 774. Appellants also pointed out the recognition given by the dissenting opinion in the *Telegraphers* case to this Court's interpretation of Section 5(2)(f) in the *Railway Labor Executives' Association* case and the dissenting opinion's disagreement with that interpretation. The District Court, however, ignored the specific portions of those opinions upon which appellants relied stating that it deemed the specific holding of this Court in each case to be "inapposite to the issue here." (R. 202.) The District Court noted that the dissenting opinion in the

Telegraphers case "specifically stated at pages 355 and 357 that, under 5(2)(f) of the Act, the Commission had no authority to 'freeze existing jobs.' The majority opinion, however, never reached this question." (R. 202.)

The appellants also relied upon the legislative history of Section 5(2)(f). The entire legislative history of that provision was laid before the District Court. That court, however, dismissed this compellingly clear record of congressional intent with the single comment: "Congress knew what the Harrington Amendment sought to accomplish and refused to include that language or its equivalent." (R. 201.)

The District Court relied upon that "contemporaneous construction" doctrine holding that the Commission in its 1941 report "referred to 5(2)(f) as granting only compensatory benefits." (R. 201.) The portion of the report relied upon by the court, however, merely states the type of conditions the Commission imposed and makes no affirmative statement that such conditions are the only conditions required by Section 5(2)(f). Even if the statement contained in the 1941 report of the Commission could be considered "contemporaneous construction," it is at best a negative construction. In any event, it was established by this Court in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721 and *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373, 380, 67 S.Ct. 717, 86 L.Ed. 904, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.

The District Court relied heavily on articles, not introduced in evidence, from 1940 issues of magazines of five of the twenty-three railway brotherhoods affiliated through their chief executive officers with the Railway Labor Executives' Association. The court stated that these articles clearly assert the brotherhoods' understanding of Section

5(2)(f) as granting compensation to employees who lose their jobs as a consequence of merger. (R. 201.) Reliance upon this type of material is clearly contrary to decisions of this Court such as *United States v. United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L.Ed. 884. The articles cited are from magazines of a small minority of railroad brotherhoods and, at that, brotherhoods which *opposed* the Harrington Amendment because they felt insistence upon its enactment would kill the entire provision relating to mergers. In any event, the off-the-record opinions of laymen as to the effect of legislation upon them should have no bearing on the proper interpretation of that legislation by the courts.

The District Court relied upon a claimed Congressional awareness of the "construction" placed upon Section 5(2)(f) "by those interested in its interpretation and enforcement" and of the "failure" of Congress to do anything by way of clarification. (R. 202.) Of course, there has been no reason for the Congress to modify Section 5(2)(f), regarding the protection it affords employees because the issue presented here has never before arisen. Moreover, such a ground was rejected by this Court in *Interstate Commerce Commission v. Railway Labor Executives' Association*, 315 U.S. 373, 62 S.Ct. 717, 86 L.Ed. 904, as a means of interpreting the provisions of paragraphs 18 through 20 of section 1 of the Interstate Commerce Act (41 Stat. 477, 49 U.S.C. § 1(18)-(20)) subsequent to the passage of Section 5(2)(f).

The District Court also held that the plain language of the provision in question "mitigates against the plaintiffs' contention" because subparagraph ~~is~~ is "couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition much less that of guaranteed employment." (R. 199.) The court agrees that the controlling phrase is "in a worse position with respect to employment" (R. 199) but claims that had Congress desired to protect employees with respect to their

employment it would have followed the precise language it used in the 1933 Act or the after-enacted Communications Act of 1943, 57 Stat. 5, 47 U.S.C. § 222(f). The fallacy in the District Court's reasoning here extends beyond its failure to give to the language of the controlling phrase, and particularly the term "employment", its ordinary, commonly accepted meaning; it also refuses to recognize the obvious fact that Congress in modifying the Harrington Amendment combined into one phrase the *words and substance* of the two phrases contained in the employment protection provision of the 1933 Act. The District Court failed to acknowledge the additional fact that the legislative history of the Communications Act of 1943 shows that Congress in 1943 recognized that employment protection had been granted railroad labor in Section 5(2)(f).

Finally, the District Court affirmatively held that "worse position with respect to their employment" does not protect employment, however, the court makes no affirmative finding as to what it otherwise possibly could be intended to protect; yet it holds that there is no "ambiguity within the structure of 5(2)(f)." (R. 200.)

The District Court in arriving at its decision in this case failed to apply the innumerable decisions of this Court applicable to statutory construction to the effect that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else is meant." *United States v. First National Bank*, 234 U.S. 245, 258, 34 S.Ct. 846, 58 L.Ed. 1298, and cases cited *supra* at page 34.

The District Court also failed to apply the rules laid down by the decisions of this Court in determining from legislative history the meaning of statutory words which may be in doubt. *Mastro Plastics Corp. et al. v. N.L.R.B.*, 350 U.S. 270, 288, and cases cited *supra* at page 68.

Finally, the District Court proceeded contrary to the rulings of this Court in relying upon off-the-record material

contained in magazines as an aid in examining the legislative history of the statute. *United States v. United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L.Ed. 884.

VII

THE DISTRICT COURT ERRED IN RELYING UPON OFF-THE-RECORD MATERIAL WHILE REFUSING TO ACCEPT UN-CHALLENGED SWORN TESTIMONY

At the hearing on the merits before the three-judge court, the testimony of H. C. Crotty, taken previously before Judge Thornton, was offered but not received in evidence. (R. 178-179.) This testimony amplified the evidence of record before the Commission by describing the effects of mergers on employees, as well as the effects of the application of the "New Orleans conditions." (R. 175, 178-179.)

The three-judge court erred in refusing to receive and consider such evidence. It compounded the error by itself considering matters outside of either record.

In *United States v. State of Idaho*, 298 U.S. 105, 109, 56 S. Ct. 69, 80 L.Ed. 1070, this Court said:

"* * * The case was heard before three judges. The sole controversy was whether the trackage was a 'spur' or 'industrial track'; and, therefore, excluded from the jurisdiction of the Interstate Commerce Commission. The record made before the Commission was introduced in evidence; also some testimony 'which merely amplified evidence already in the record.'
* * *"

"* * * Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. * * * Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellees' counsel

concede, the court did not err in admitting the additional testimony. * * *

In *Baltimore & Ohio Railroad Company v. United States of America*, 298 U.S. 349, 353-4, 372, 56 S. Ct. 797, 80 L.Ed. 1269, the plaintiffs claimed that the Commission's order deprived them of their property without just compensation and this Court held:

"* * * The complaint assails the order upon the grounds that it is based on a misconstruction of the Act and is confiscatory. The case was tried by three judges. In addition to the evidence given before the commission there were offered and received at the trial the testimony of many witnesses and much documentary evidence. The court held plaintiffs not entitled to relief and dismissed the case. They appealed."

"Appellants appropriately invoked judicial power to obtain constitutional protection against the commission's order. The district court rightly held them entitled to introduce evidence in addition to that contained in the record before the commission and rightly proceeded upon consideration of all the evidence to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question." (298 U.S. at 353-354, 372.)

In light of the fact that the Crotty testimony amplified the record it should have been admitted and relied upon. The magazine articles, on the other hand, which were never offered should not have been relied upon. *United States v. United Mine Workers of America*, 330 U.S. 258, 281-282, 67 S.Ct. 677, 91 L.Ed. 884.

CONCLUSION

For the reasons stated, the judgment and order of the District Court is erroneous and should be reversed with directions to set aside as contrary to law that part of the Commission's report and order of September 13, 1960, which holds that it is not required by statute to protect the employment position of all employees involved; to direct the Commission to take such action as will provide employment protection consistent with the requirements of Section 5(2)(f), and to issue a permanent injunction based upon the temporary restraining order now in effect which will remain effective until such time as the Commission has complied with those requirements of Section 5(2)(f).

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APPENDIX

APPENDIX A

The following are the reported Section 5 cases decided since the enactment of Section 5(2) (f) on September 18, 1940, and reported in the bound volumes of Commission reports:

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
12830	10-18-40	Union Term. Ry. Co. & St. Joseph Belt Ry. Co. Control	242 ICC 197	No	None
13007	10-29-40	Illinois Central R. Co. Operation	481	No	None
12992	11-9-40	Virginian Ry. Co. Operation	503	No	None
12958	11-26-40	Madison, I. & St. L. Co. Purchase	586	No	None
13076	11-28-40	City of Galveston Acquisition, Operation, and Bonds	605	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
12973	11-29-40	Denver & R. G. W. R. Co. Trustees Abandonment	242 ICC 619	No	None
12975	12-3-40	Wichita Falls & S. R. Co. Acquisition	659	No	None
13028	12-3-40	Chesapeake & O. Ry. Co. Operation	665	No	None
13026	12-18-40	Pennsylvania R. Co. Operation	693	No	None
12382	12-21-40	Dayton Union Ry. Co. Acquisition	727	No	None
13003	12-21-40	Baltimore & O. R. Co. Operation	763	No	None
13008	12-30-40	Texas & P. Ry. Co. Operation	775	No	None
13015	1-7-41	Erie R. Co. Trustees Purchase	244 ICC 13	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13017	12-30-40	Atchison, T. & S. F. Ry. Co. Operation	244 ICC 33	No	None
13058	1-25-41	Winchester & W. R. Co. Purchase	151	No	None
13156	1-27-41	Atchison, T. & S. F. Operation	173	No	None
11317	2-13-41	Louisiana & A. Ry. Co Operation	235	No	None
12414	3-4-41	Minneapolis & St. L. R. Co. Reorganization	357	RLEA	Juris. Reserved
12698	4-9-41	New York Central R. Co. Operation	550	No	None
13118	4-7-41	Louisiana & A. Ry. Co. Operation		No	None
13100	4-15-41	Baltimore Steam Packet Co. Acquisition and Control	583	No	Juris. Reserved ¹

¹ In this case the Commission under section 5(2)(c) imposed a temporary job freeze pending determination of the effect of the transaction upon the carrier's employees. No other case has been found in which even a temporary stay was imposed by the Commission.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13242	5-26-41	Cleveland & R. R. Co. Purchase	244 ICC 793	No	Compensation for 4 years.
12656	5-8-41	Chicago, M., St. P. & P.R. Co. Trustees Operation	247 ICC 1	No	None
13137	5-14-41	Chester & Mt. V. R. Co. Lease	11	No	None
13247	5-27-41	Greenbrier, C. & E. R. Co. Lease	25	No	None
13209	5-31-41	Burlington-R. I. R. Co. Abandonment of Operation	79	No	None
13323	6-28-41	Atchison, T. & S. F. Ry. Co. Merger	173	No	None
13230	6-26-41	Moosic Mountain & C. R. Co. Purchase	241	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
12843	7-8-41	Texas & P. Ry. Co. Operation	247 ICC 285	RLEA et al.	4-year compensation
12859	7-30-41	St. Louis National Stockyards Co. Lease	363	No	None
13235	9-29-41	Wabash R. Co. Control	365	No	Juris. Reserved
13194	8-9-41	Illinois Central R. Co. Operation	415	No	None
13336	8-14-41	Gulf, M. & O. R. Co. Operation	435	No	None
13276	8-25-41	Montour R. Co. Operation	503	No	None
13243	8-25-41	Durham & S. C. Co. Lease	509	No	None
13310	8-25-41	Northern Pac. Ry. Co. Purchase	513	No	Juris. Reserved
13010	7-29-41	Wabash Ry. Co. Receivership	581	No	None

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
9033	5-28-41	Texas & N. O. R. Co. Operation	247 ICC 625	No	None
13218	9-2-41	Missouri Pac. R. Corp. in Nebraska Trustee Operation	653	No	None—agree- ment between parties
13306	8-27-41	Forth Worth & D. C. Ry. Co. Operation	659	No	None
13393	10-3-41	Unadilla Valley Ry. Co. Purchase	249 ICC 1	No	Juris. Reserved
11915	10-3-41	Erie R. Co. Reorganization	279	No	None
13384	10-28-41	Southern R. Co. Purchase	357	No	None
11915	10-27-41	Erie R. Co. Reorganization	413	No	None
13382	10-25-41	State Line & S. R. Co. Control	441	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13475	11-12-41	Wheeling & L. E. Control	249 ICC 490	No	None
13456	11-15-41	Los Angeles Union Stock Yards Co. Lease	499	No	None
13515	11-18-41	Harriman & N. E. R. Co. Abandonment	518	No	None
13377	12-4-41	Missouri Pac. R. Co. Trustee Purchase	568	No	None
13332	12-6-41	Texas & N. O. R. Co. Operation	595	No	None
11915	12-13-41	Erie R. Co. Reorganization	639	No	None
13513	12-6-41	Southern Iowa Ry. Co. Purchase	653	No	None
13551	12-23-41	Franklin & T. R. Control	743	No	None
13555	12-24-41	Boston & M. R. Operation	755	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13541	12-30-41	New York, S. & W. R. Co. Trustee Operation	249 ICC 758	No	None
13554	12-23-41	Boston & M. R. Operation	761	No	None
13550	12-23-41	Boston & M. R. Operation	763	No	None
13497	12-30-41	New York, S. & W. R. Co. Trustee Purchase	777	No	None
13085	1-17-42	Chicago, M., St. P. & P. R. Co. Trustees Construction	262 ICC 49	RLEA	4-year compensation
13385	1-27-42	Kansas City S. Ry. Co. Purchase	113	No	None
13539	2-7-42	Port San Lois Transp. Co. Purchase Operation and Stock	137	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13730	6-8-42	Cuyahoga Valley Ry. Co. Control	252 ICC 683	No	None
13793	8-14-42	Pennsylvania, O. & D. R. Co. Trackage Operation	709	No	None
13496	10-13-42	Pittsburgh, L. & W. R. Co. Purchase	254 ICC 144	No	Juris. Reserved
13956	11-24-42	Atchison, T. & S. F. Ry. Co. Merger	159	Emp.	None
14054	12-29-42	Rio Grande, E. P. & S. F. R. Co. Lease	196	No	None
13496	3-8-43	Pittsburgh, L. & W. R. Co. Purchase	202	No	Juris. Reserved
13610	3-9-43	Stockyards Ry. Co. Control	207	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
1401	3-9-43	St. Paul Union Stockyards Co. Lease	254 ICC 215	No	None
14114	7-21-43	Erie R. Co. Purchase	486	No	None
14192	10-15-43	Kansas City Southern Ry. Co. Merger	529	No	None
14367	11-16-43	Wheeling & L. E. Ry. Co. Control	633	No	None
14360	11-26-43	Atlanta & C. A. Co. Bonds	641	No	None
9923	12-27-43	Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization	694	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14433	5-15-44	Delaware, L. & W. R. Co. Merger	257 ICC 91	No	None
14221	5-17-44	Oklahoma Ry. Co. Trustees Abandonment	177	RLEA	Oklahoma conditions
14510	6-28-44	Canton, A. & N. R. Co. Lease	346	No	None
14600	9-12-44	Delaware & H. R. Corp. Merger	453	No	None
14501	9-30-44	Seaboard Ry. Co. Acquisition	584	No	None
14367	10-13-44	Wheeling & L. E. Ry. Co. Control	713	No	None
14706	12-30-44	Columbia & Millstadt R. Co. Purchase	729	Labor Org.	Juris. Reserved
14642	10-21-44	Milwaukee Livestock Handling Co. Control	796	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14802	4-17-45	Fox Purchase	261 ICC 95	No	None
14692	6-5-45	Chesapeake & O. Ry. Co. Purchase	239	No	None
14931	9-19-45	Gulf, M. & O. R. Co. Purchase, Securities	405	RLEA	Washington
14891	11-28-45	Baltimore & O. R. Co. Lease	535	No	None
6790	12-18-45	Nicholas, Fayette & Greenbrier R. Co. Lease	546	No	None
14677	1-3-46	Chicago, B. & Q. R. Co. Abandonment	549	No	4-year compensation
14891	4-11-46	Baltimore & O. R. Co. Operation	615	RLEA et al.	Juris. Reserved
15100	2-5-46	Gulf, M. & O. R. Co. Purchase	623	No	None

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
15250	5-29-46	Chicago & N. W. Ry. Co. Merger	261 ICC 672	RLEA	North Western
14500	6-28-46	Seaboard Air Line Ry. Co. Receivership	689	No	North Western
15321	6-21-46	Pere Marquette Ry. Co. Trackage Rights	750	No	North Western
14992	6-26-46	Central R. Co. of Pennsylvania Lease	755	Labor Org.	North Western
15158	8-7-46	St. Louis, S. F. & T. Ry. Co. Trackage Rights	267 ICC 30	Labor Org.	North Western
12859	2-27-47	St. Louis National Stockyards Co. Lease	80	No	None
14931	2-10-47	Gulf, M. & O. R. Co. Purchase, Securities	145	Labor Org.	North Western
15181	12-10-46	Wheeling, & L. E. Ry. Co. Control	163	RLEA	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
14931	3-10-47	Gulf, M. & O. R. Co. Purchase, Securities	267 ICC 201	No	North Western
15181	3-10-47	Wheeling & L. E. Ry. Co. Control	203	No	None
15228	4-1-47	Pere Marquette Ry. Co. Merger	207	RLEA	North Western
14931	5-8-47	Gulf, M. & O. R. Co. Purchase, Securities	265	RLEA	Washington & North Western
15685	6-25-47	Wheeling & L. E. Ry. Co. Control	401	No	None
15711	8-18-47	Southern Pac. Co. Reincorporation	523	No	North Western
15605	12-8-47	Niagara Junction Ry. Co. Control	649	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13085	12-18-47	Chicago, M., St. P. & P. R. Co. Trustees Construction	267 ICC 690	No	4-year compensation
15920	4-7-48	New Orleans Union Passenger Terminal Case	763	RLEA et al.	Oklahoma
16041	5-21-48	Beech Creek R. Co. Control	271 ICC 1	No	North Western
16042	10-7-48	Union Belt Ry. Oakland Control	223	No	North Western
15785	10-20-48	Chicago, B. & Q. R. Co. Abandonment.	261	Labor Org.	Burlington
16325	5-5-49	Gulf, M. & O. R. Co. Purchase	659	No	North Western
16395	7-6-49	Chicago, B. & Q. R. Co. Trackage Rights	675	RLEA et al.	Washington & North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
16308	7-21-49	Wheeling & L. E. Ry. Co. Lease	271 ICC 713	RLEA et al.	Washington & North Western
15947	9-9-49	International-G. N. R. Co. Trustee Trackage Rights	275 ICC 27	Labor Org.	Oklahoma
16278	9-19-49	Bessemer & L. E. R. Co. Merger	167	No	North Western
16697	12-14-49	Gulf, M. & O. R. Co. Purchase	197	No	North Western
16592	3-7-50	Houston Belt & Term. Ry. Co. Control	289	Labor Org.	Washington & North Western
16042	4-26-49	Union Belt Ry. of Oakland Control	343	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
16809	6-1-50	Cambria & Indiana R. Co. Control	275 ICC 360	No	North Western
16426	5-2-50	Detroit, T. & I. R. Co. Control	455	RLEA	Washington & North Western
16167	12-5-50	Southern Ry. Co. Purchase	724	No	North Western
15947	5-23-51	International-G.N.R. Co. Trustee Trackage Rights	282 ICC 30	No	North Western
16968	5-10-51	Savannah & A. Ry. Co. Control	39	RLEA	Washington & North Western
17573	1-16-52	Arkansas & L. M. Ry. Co. Control	255	No	North Western
15920	1-16-52	New Orleans Union Passenger Terminal Case	271	RLEA	New Orleans

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
17522	2-20-52	Rockdale, S. & S. R. Co. Operation and Control	282 ICC 297	No	North Western
17584	3-31-52	Chesapeake & O. Ry. Co. Trackage Rights	304	Labor Org.	North Western
16989	3-7-52	Gulf, M. & O. R. Co. Abandonment	311	Labor Org.	Oklahoma
17539	3-25-52	Chicago, R. I. & P. R. Co. Acquisition	344	RLEA et al.	Burlington
12347	3-31-52	New York Connecting R. Co. Trackage Rights	353	No	North Western
17573	7-14-52	Arkansas & L. M. Ry. Co. Control	564	No	None
17134	8-31-51	Pacific Coast R. R. Co. Control	600	Labor Org.	Washington & North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
16690	10-17-52	Gulf, M. & O. Ry. Co. Trackage Rights	282 ICC 689	Previous Rept. Above	
17893	12-12-52	Valdosta S. R. Purchase	705	Labor Org.	Washington, Burlington & North Western
17217	3-2-53	South Western R. Co. Control	714	No	North Western
18118	5-29-53	United New Jersey R. & C. Co. Control	737	No	North Western
17585	8-17-53	St. Louis S. W. Ry. Co. of Texas Abandonment	290 ICC 53	Labor Org.	Oklahoma
17992	8-7-53	Harris County Houston Ship Channel Nav. Dis. Operation	83	No	North Western
17954	10-23-53	Arkansas & L. M. Ry. Co. Construction	112	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
18116	12-18-53	St. Louis S. W. R. Co. of Texas Lease	290 ICC 205	Labor Org.	New Orleans
18180	1-20-54	Sacramento N. Ry. Trackage Rights	229	No	North Western
18540	6-25-54	Arkansas & L. M. Ry. Co. Control	243	No	North Western
18249	7-13-54	South Georgia Ry. Control	281	RLEA et al.	Oklahoma
18163	6-10-54	Wichita Falls & S. R. Co. Abandonment	303	RLEA et al.	Burlington & North Western
9033	8-4-54	Texas & N. O. R. Co. Operation	355	No	North Western
18656	3-2-55	Louisville & J. B. R. Co. Merger	725	No	North Western

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
18540	4-12-55	Arkansas & L. M. Ry. Co. Control	290 ICC 750	No	North Western
18617	9-27-55	Sacramento N. Ry. Trustees Abandonment	295 ICC 73	RLEA et al.	Burlington
18778	11-22-55	Wellsville, A. & G. R. Corp. Purchase and Control	115	RLEA et al.	Oklahoma
19182	8-27-56	Erie R. Co. Trackage Rights	303	RLEA et al.	New Orleans
19329	2-5-57	Wisconsin Central R. Co. Operation	413	No	North Western
9033	10-24-56	Texas & N. O. R. Co. Operation	420	No	North Western
19315	12-20-56	Spokane International R. Co. Control	425	RLEA et al.	North Western
19432	12-28-56	Chicago, St. P. M. & O. Ry. Co. Lease	441	RLEA	Oklahoma

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
18845	3-1-57	Louisville & N. R. Co. Merger	295 ICC 457	Labor Org.	New Orleans
18698	2-12-57	Camp Lejeune R. Co. Securities and Operation	511	No	North Western
18991	5-31-57	Toledo, P. & W. R. Co. Control	523	RLEA et al.	Washington
19159	7-9-57	Central of Georgia R. Co. Control	563	No	North Western
19583	7-23-57	Durham & S. C. R. Co. Control	585	No	North Western
19677	4-14-58	Illinois Central R. Co. Merger	731	No	North Western
19989	7-24-58	Delaware, L. & W. R. Co. Trackage Rights	743	RLEA et al.	New Orleans

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
13170	11-3-58	Florida East Coast R. Co. Reorganization	307 ICC 5	RLEA	New Orleans
20026	9-7-59	Chicago S. S. & S. B. R. Trackage Rights	329	No	North Western
20599	10-8-59	Norfolk & W. Ry. Co. Merger	401	RLEA et al.	Stipulated and Oklahoma
19453	12-8-59	St. Johnsbury & L. C. R. Control	489	RLEA et al.	Previous Report
19538	10-5-59	Illinois Central R. Co. Construction and Trackage	493	No	North Western
20852	12-11-59	Atlantic Coast Line R. Co. Merger	614	RLEA	Oklahoma
12347	2-8-60	New York Connecting R. Co. Trackage Rights	702	No	Oklahoma

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Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions
20751	3-28-60	Missouri-K-T R. Co. Consolidation	312 ICC 13	RLEA	Oklahoma
20956	4-28-60	Chicago, M. St. P. & P. R. Co. Trackage Rights	75	No	Oklahoma
21024	6-3-60	Winston-Salem Southbound Ry. Co. Control	138	No	Oklahoma
20978	6-24-60	Texas & N. O. R. Co. Merger	147	No	Oklahoma

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, *et al.****Appellants,*

vs.

UNITED STATES OF AMERICA, *et al.**Appellees.*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN**BRIEF FOR APPELLEE ERIE-LACKAWANNA
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March 23, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

No. 681

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN

**BRIEF FOR APPELLEE ERIE-LACKAWANNA
RAILROAD COMPANY**

OPINIONS BELOW

The order and report of the Interstate Commerce Commission (hereinafter the Commission) (R. 10) is reported at 312 I. C. C. 185. The opinion of the three-judge District Court upholding the action of the Commission (R. 196) is reported at 189 F. Supp. 942.

STATUTE INVOLVED

The statute involved is Section 5(2)(f) of the Interstate Commerce Act (hereinafter the Act) enacted as part of the Transportation Act of 1940 (54 Stat. 905, 49 U. S. C. § 5(2)(f)):

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

QUESTION PRESENTED

The question presented is:

Whether the second sentence of § 5(2)(f) requires the Commission to impose as a minimum condition to its approval of all railroad mergers a "job freeze", by which all employees of the merging railroads must be retained in the same or equivalent jobs for a period equal in time to their prior service, not to exceed four years, with the result that jobs cannot be abolished during that period except by attrition.

That is the only question raised by appellants before the Commission and in the court below. No question is raised or presented as to whether the Commission has discretion to impose a job freeze or abused its discretion in refusing to impose a job freeze in its approval of this merger.*

STATEMENT OF THE CASE

This case represents the first challenge by railway labor to a unique body of compensatory protection for railroad employees affected by railroad combination. That protection has been developed by Congress, by the Commission, by railway management and by railway labor itself over the

*Appellants' position does not admit of any discretion in the Commission. Throughout these proceedings appellants' claim has been that, as a matter of law, the second sentence of § 5(2)(f) lays down a rigid minimum requirement that a job freeze be imposed in all railroad mergers (and other transactions subject to Section 5 of the Act), and that the statutory command is not satisfied by any other form of protection, such as compensatory conditions. That was the issue presented to the examiner (R. 186-188), the Commission (R. 196, 19, 26), and the court below (R. 170, 181, 198). And that is the issue tendered to this Court by appellants' brief (see, e.g., Question 4 at p. 3, and p. 33).

This broad claim of appellants for a mandatory rule, applicable to all transactions under Section 5 of the Act, must accordingly be considered in the light of its impact on railroad consolidations generally, under all conceivable circumstances, and not solely in the light of the facts of this or any other particular case. Appellants concede as much (Br. 20-21) and frankly admit that their extreme position is prompted by the number of railroad mergers presently pending and contemplated (Br. 5-6, 11-12).

It is therefore neither necessary nor appropriate for this Court to consider or decide whether the Commission may, under certain circumstances, have discretion or power to impose a job freeze under § 5(2)(f). Since such a question is neither raised nor presented here, it can and should be left for determination to such time as it may be properly presented in the first instance to the Commission. *United States v. Western Pac. R. R.*, 352 U. S. 59, 62-65; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U. S. 411, 416-422.

The first four questions presented by appellants (Br. 2-4) are but variants of the question as stated above. Their fifth question (Br. 4) is without substance for the reasons stated *infra* pp. 58-59.

past twenty-five years. Beginning with the Washington Agreement of 1936 (R. 139-151), between railway labor and management, railway workers displaced (that is, moved to different locations and/or to lower paying jobs) or furloughed (that is, dismissed from active employment) as a result of mergers, coordinations and other combinations of facilities have enjoyed substantial and unusual monetary protection against the effect of reorganization unknown to the general labor force of this nation. Congress adopted that policy in Section 5(2)(f) of the Transportation Act of 1940. The development of that system of benefits, culminating in its latest expression in the New Orleans Conditions (R. 152-159), has been a history of steady expansion of protection, regardless of the financial condition of the railroads bearing the economic burden thereof. Thus for twenty-five years, as a result of collective bargaining agreements and Congressional policy, railway labor has occupied a sheltered enclave in the national economy.

Rejecting the principle of compensatory benefits, appellants now claim, for the first time, that employees may not be displaced or dismissed by reason of rail mergers—that the second sentence of § 5(2)(f) requires the Commission to impose as a minimum, in every merger or similar transaction,* provisions for a job freeze under which affected employees will somehow be maintained in their same, or equivalent, or comparable jobs at comparable pay, for a period of up to four years. This sudden concern and change of position is prompted, appellants allege, by the large number of railroad mergers pending and anticipated,** which appellants fear will aggravate the continuing contraction of the railway labor force. Railway labor's response to this

*Section 5(2) of the Act deals with consolidations, mergers and similar railroad unification arrangements, all of which it refers to as "transactions". The term "merger" is generally used in this brief as meaning the "transactions" covered by § 5(2).

**A development which Congress has consistently encouraged, under proper conditions, since 1920. See discussion, *infra* at pp. 42-48.

problem is to insist upon a policy of complete preservation, in every situation, of jobs, whether needed or not, by the merging railroads.

This sweeping claim comes before this Court in the following context:

Facing virtual financial collapse as separate organizations, the Erie Railroad Company (hereinafter Erie) and The Delaware, Lackawanna and Western Railroad Company (hereinafter Lackawanna) entered into a merger agreement, dated June 24, 1959, in the hope of effecting by such merger sufficient economies and improvements in service to permit continued operation.* On July 6, 1959, they filed a Joint Application with the Commission for permission, pursuant to Section 5 of the Act, to consummate the proposed merger. *Erie Railroad Company—Merger, Etc.—Delaware, Lackawanna & Western Railroad Company, Finance Docket No. 20707*. In that Joint Application, Erie and Lackawanna stated (p. 37), “[t]he Applicants consent to the entry of an order by the Commission for the protection of employees in conformity with the order in *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271 (1952).” The conditions prescribed in that case, commonly known as the “New Orleans Conditions”, afford affected employees broad compensatory protection in the event of displacement or discharge.** Neither those condi-

*R. 26; White Affidavit, printed as Appendix C (p. 34a) to our Memorandum of February 3, 1961, responding to the Jurisdictional Statement.

**The New Orleans Conditions (R. 152-159), among other things, insure against loss of income during the protected period. Thus, if an employee is displaced to a lower paying job, he is paid the difference in pay. If he is dismissed, he continues to receive his same pay until he obtains other employment, in which event if the new job pays less, he continues to receive the difference. The conditions also make provision for continuance of fringe benefits such as pensions, hospitalization, et cetera (R. 157). If an employee is required to change his residence, his moving expenses are paid and he is protected against loss on the sale of his house (R. 158-159).

tions nor any conditions ever imposed by the Commission require a job freeze.

Between September 29 and October 22, 1959, hearings were held before an Examiner on the Joint Application. Appellant Railway Labor Executives' Association (hereinafter RLEA), intervened at the outset, in behalf of appellant Brotherhood of Maintenance of Way Employees (hereinafter Brotherhood) and other railroad brotherhoods, and was represented throughout those hearings. RLEA introduced no evidence at those hearings and never suggested that the conditions proposed by the applicants would not meet the statutory standard. Nor did RLEA suggest, by evidence or argument, that any different conditions should be approved. Indeed, throughout the proceedings before the Commission RLEA never suggested that the New Orleans Conditions were inadequate as compensatory conditions, if compensatory conditions were all that § 5(2)(f) required, and RLEA actually proposed the incorporation of those Conditions in its freeze proposal. (R. 188-190)

It was not until after the record had been closed that RLEA, in its brief filed with the Examiner,* argued for the first time that neither the New Orleans Conditions nor any other merely compensatory conditions would satisfy the requirements of § 5(2)(f) (R. 170). RLEA admitted in its brief that for almost 20 years, ever since § 5(2)(f) was added to the Act in 1940, it and railway labor in general had agreed that compensatory conditions met the requirements of the Act. Nevertheless, RLEA asserted that § 5(2)(f) requires, as a *minimum*, that all employees affected by a proposed merger must be given complete preservation of employment. As justification for its new position, RLEA stated that the large number of impending

*The record in Finance Docket No. 20707 was closed on October 22, 1959. RLEA filed its brief on November 23, 1959.

railroad mergers required a re-examination of the *minimum* legal requirements of § 5(2)(f). With its brief RLEA submitted conditions which, in its view, would satisfy that minimum statutory requirement. Those conditions (R. 188-190) provide in substance for a job freeze *plus* any additional monetary benefits that the New Orleans Conditions might afford.*

Since RLEA did not raise its novel job freeze claim until after the record had been closed, the record before the Commission and before this Court does not, as the Commission noted (R. 20),** show what the impact of that freeze would be on the merged carrier, Erie-Lackawanna Railroad Company (hereinafter Erie-Lackawanna).

The Examiner's Recommended Report and Order of March 30, 1960, recommended approval of the merger and imposition of the New Orleans Conditions for the protection of affected employees (R. 183-188). RLEA filed exceptions, challenging the Examiner's recommendation and again asserting its unique and unsupported position that § 5(2)(f) requires job preservation. RLEA argued its position before the entire Commission on July 20, 1960. Thereafter, on September 15, 1960, the Commission served its Report and Order approving the proposed merger as recommended. (R. 10)

*The conditions submitted require "complete preservation of employment for four years" for "all employees adversely affected by the merger", regardless of the employee's period of prior service (R. 190). Appellants have since abandoned the claim for four year protection for all employees since the statute clearly limits the period of protection to the length of prior service, if less than four years.

**The record does contain a report, submitted by the railroads, prepared by Wyer, Dick and Company in 1958 estimating the cost of complying with the New Orleans Conditions on the basis of the employment figures for 1956. Appellants attempt to use certain figures in that report (R. 112) to suggest that their job freeze contention would not work a hardship on the Erie-Lackawanna. (Br. 7, 25). For the reasons stated *infra*, p. 45 such use of those figures is inappropriate.

In its unanimous Report the Commission discussed RLEA's legal argument at length (R. 17-26). It found from a review of the Act, its legislative history and the relevant precedents that "the association's [RLEA's] newly asserted position that the act requires us to maintain railway employees in their jobs is incorrect and untenable". Further, the Commission stated (R. 26):

"Assuming that we have power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

As stated on page 3, *supra*, no question of the Commission's power or discretion is involved, since the issue is whether § 5(2)(f) *requires* the Commission to impose a job freeze in all mergers as a *minimum*.

On October 7, 1960, the Brotherhood brought this action in the District Court for the Eastern District of Michigan to enjoin and set aside the Commission's Order. RLEA and Erie-Lackawanna intervened. After a preliminary hearing on October 12, Judge Thomas P. Thornton, by order entered October 14, 1960 (R. 160-162), permitted the consummation of the merger on October 17, but stayed any action by the merged road adversely affecting employees.

The case was thereafter fully briefed and argued on November 15, 1960. By opinion dated December 7 the three-judge court unanimously rejected appellants' claim (R. 196). Appellants' efforts to stay the impact of that opinion resulted in two additional hearings on December 8

and December 19, when the court below entered its order dismissing the action and denying any stay (R. 204). The appeal to this Court and renewal of the stay followed (R. 211).

SUMMARY OF ARGUMENT

Appellants claim that the second sentence of § 5(2)(f) is no longer satisfied by compensatory conditions, but now requires a job freeze as a minimum in all rail mergers. Appellants would thereby erase 20 years of history which they have significantly helped to shape. Included in that history are: (a) railway labor's interpretation of § 5(2)(f) when enacted in 1940 as providing financial benefits; (b) the Commission's contemporaneous and continued construction of the statute as requiring compensatory conditions; (c) railway labor's active acceptance of that construction and its cooperation with the Commission and railway management in the development of appropriate compensatory conditions; (d) the absence of any claim that a job freeze was required until that contention was raised in this proceeding. It is accordingly understandable why appellants thus far have not been able to persuade anyone that their newly asserted position is correct. Their job freeze claim has been rejected without qualification or dissent by the Examiner, by the full Commission and by the three judges of the statutory court below. It should likewise be rejected by this Court.

1. Section 5(2)(f) is couched in such general language as to be hardly susceptible of an interpretation requiring any specific condition, much less a mandatory job freeze. The section does not state that employees are to be maintained in their jobs, that jobs cannot be abolished or that there is to be a job freeze. Instead, the critical

second sentence of § 5(2)(f) simply provides in general language that the Commission shall include in its order approving a merger "terms and conditions" providing that for a period of up to four years the merger will not result in affected employees "being in a worse position with respect to their employment". Appellants would read that phrase as if it provided that employees are to be maintained in their employment by the merged carrier. But the statute uses the comparative "with respect to" and does not tie the word "employment" to "present employment". The statute thus can appropriately be construed, as the Commission has done, to provide simply that compensatory protection must be given so that "the employee's position as it relates to his livelihood is unharmed by the transaction".

Appellants' construction ignores the fact that the statute deals with "affected" employees, which this Court has read in its ordinary sense of "adversely affected". *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 155. Under appellants' job freeze thesis, there would be no "adversely affected" employees during the protective period of the second sentence of § 5(2)(f).

Appellants' "plain meaning" contention also founders on the fact that when Congress has deemed an employment freeze justified, it has provided therefor in explicit and self operating terms which contrast sharply with the general language of § 5(2)(f) and the provision therein for the Commission to include terms and conditions. See the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, which was special legislation in effect for only three years, and Section 222(f) of the Communications Act (47 U. S. C. 222(f)), passed in 1943 virtually as a private bill for the merger of the Postal Telegraph Company into Western Union. Significantly, it was explained to Congress in connection with that 1943 legislation why the difference

in the telegraph and railroad industries required Congress to do more for telegraph employees in 1943 than it did for railroad labor in § 5(2)(f) in 1940 (89 Cong. Rec. 1195-1196).

2. The legislative history of § 5(2)(f) does not compel appellants' job freeze construction. Instead it supports the Commission's compensatory construction.

Appellants are faced with the impossible task of demonstrating that the language of the rejected Harrington Amendment, which provided

"That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees",

means exactly the same thing as the second sentence of § 5(2)(f) requiring the Commission to include "terms and conditions" providing that the transaction will not result in employees *affected* "being in a worse position with respect to their employment". Such a demonstration, however nimbly and extensively articulated, flies in the face of reality, particularly since appellants' previous position has long been to the contrary.

In considering the legislative history of the second sentence of § 5(2)(f), the important fact is not what the proponents and the supporters of the Harrington Amendment thought that amendment meant or what they stated concerning the modification made by the Wadsworth motion to recommit. The important fact is that the second sentence, in the form enacted, was written in conference as a substitute for the modification of the Wadsworth motion. It was explained by its authors, the conferees, in terms stating that it would not delay mergers and showing that it contemplated the dismissal and displacement of em-

ployees. In that event such employees would be given protection in the form of monetary benefits to make them financially whole during the protected period. See the Conference Report at 86 Cong. Rec. 10167, and the explanations of House Managers Lea, Halleck and Wolverton at 86 Cong. Rec. 10178, 10187 and 10189. Those explanations were not challenged nor was any claim raised that the second sentence of § 5(2)(f) required a job freeze, instead of compensatory benefits, during the course of the consideration and adoption of the Conference Report in the House and in the Senate.

3. The Commission, contemporaneously with the enactment of § 5(2)(f) in 1940, and continuously since, has construed § 5(2)(f) as requiring only compensatory conditions. The Commission has *never* imposed the job freeze which appellants now belatedly urge that the second sentence of § 5(2)(f) inflexibly requires in all rail mergers. Promptly in 1941, the Commission advised Congress of its practice of requiring compensatory benefits for displaced and dismissed employees and Congress has never questioned that practice. The Commission's construction is reasonable under the terms of § 5(2)(f) and its legislative history. Moreover, the Commission's construction is confirmed by the understanding of § 5(2)(f) expressed in publications of railway labor (*infra*, pp. 39-40) at the time of its enactment and has had labor's support in many cases involving large numbers of employees until the present challenge. This history completely refutes appellants' contention that the plain meaning and the legislative history of § 5(2)(f) alike require preservation of jobs. Under these circumstances, the Commission's construction is entitled to great weight and should be upheld. *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549; *F. T. C. v. Mandel Bros.*, 359 U. S. 385, 391.

4. Appellants' job freeze thesis conflicts with the Congressional policy of fostering an efficient and financially sound railway system and must be rejected since it is not compelled by any of the relevant guides to the construction of § 5(2)(f)—its language, its legislative history and its contemporaneous and continued administrative construction.

Beginning with the Transportation Act of 1920, Congress has placed continuing emphasis upon railroad mergers as an appropriate means of accomplishing its declared policy of promoting economical and efficient service and fostering sound economic conditions in transportation. A primary aim of that policy is "the avoidance of waste", *Texas v. United States*, 292 U. S. 522, 530, and the legislation must be read with that policy in mind. *Seaboard R. R. v. Daniel*, 333 U. S. 118, 124-125. Further, as stated in *County of Marin v. United States*, 356 U. S. 412, 416-417, the Congressional purpose is "to facilitate merger and consolidation in the national transportation system."

By preserving unneeded jobs, appellants' job freeze contention poses an obstacle to railroad mergers and must be rejected as in conflict with Congressional policy. As the Commission said (R. 26):

"Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

Since appellants are arguing for a rule of general application, the important consideration here is that their job freeze construction can be an obstacle to rail mergers. It is enough that appellants admit that the full benefits of a

merger may be postponed to a "limited extent" (Br. 25). Appellants try to minimize this obstacle by suggesting that attrition will swiftly eliminate surplus employees (Br. 25). But, attrition is not the easy solution which appellants suggest. Because of the human variables involved,—death, retirement, resignation—attrition simply does not operate uniformly and constantly and in all employee classifications so that jobs are created in the right places and at the right times. The experience of Erie-Lackawanna indicates that attrition is only a partial solution. Also, during the necessary interval before attrition begins to work, there will be a period of harassing uncertainty. It is virtually impossible to understand how appellants' variously described job freeze principle would operate in practice.

Under the present restraint Erie-Lackawanna, though technically merged, is in effect still operating two railroads with costly and wasteful duplication of operation and facilities. Once that restraint is lifted, the merger can be made effective in a prompt and orderly fashion; under the well-defined procedures of the New Orleans Conditions, unneeded facilities can be closed, operations can be consolidated; employees can be transferred, and unneeded employees can be dismissed. In sharp contrast, the amorphous nature of appellants' job preservation claim raises a host of questions in vital areas such as whether unneeded facilities can be closed, the extent to which operations can be consolidated, the duties, if any, which are to be assigned to employees whose services are not needed, and where those surplus employees are to perform their duties or non-duties, as the case may be. With problems like these, the benefits of the merger will inevitably be postponed.

5. The decisions of this Court in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, and *Order of Railroad Telegraphers v. Chicago & North West-*

ern Ry., 362 U. S. 330, do not support appellants' job freeze construction. To the contrary, *RLEA* refutes appellants' contention, and *Telegraphers* was not concerned with the requirements of § 5(2)(f). In *RLEA*, the question involved was whether "compensatory protection" for employees "displaced" by a section 5(2) transaction could be extended beyond the four-year period prescribed by the second sentence of § 5(2)(f). The "plain meaning" and "compelling" history of that section were not apparent to the *RLEA* in 1950, for the Association did not once suggest there that a job freeze was the minimum protection required under the second sentence of § 5(2)(f). Indeed, it acknowledged at p. 55 of its brief that compensatory conditions satisfied the minimum requirements of that sentence. This Court agreed with that construction, and noted with approval that under the Commission's order employees displaced within the four-year period "may receive compensatory protection", 339 U. S. at 154, and further confirmed its understanding that compensatory protection satisfies the command of § 5(2)(f) in its discussion of other Commission proceedings, 339 U. S. at 154-155.

Nor can appellants derive support from *Telegraphers*. The issue in that case was whether a railroad had a statutory duty to bargain concerning a union's demand for a job freeze. In dissent, four members of this Court stated that Congress in § 5(2)(f) "eliminated any power to freeze existing jobs." 362 U. S. 332, 357. Appellants argue that the majority must have taken an opposite view, but this is dispelled by the opinion of the Court which found it necessary to go no farther than to note that § 5(2)(f) recognized that "stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system . . .", 362 U. S. at 337, and that no policy elsewhere expressed in or inferred from the

Act made illegal a demand to bargain for a job freeze. *Telegraphers*, then, neither expressly nor impliedly decided that the second sentence of § 5(2)(f) required a job freeze.

6. No question of the adequacy of the New Orleans Conditions is before the Court, since their adequacy was not challenged before the Commission. *United States v. Western Pac. R. R.*, 352 U. S. 59, 62-65; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U. S. 411, 416-422. However, the complaints which appellants make on brief about the New Orleans Conditions being only partially compensatory are so insubstantial that it is appropriate to eliminate them as a point of contention by the undertakings made herein by Erie-Lackawanna consistent with those previously given in connection with the applications to this Court for a stay (see pp. 56-57 *infra*).

7. The court below did not err in referring to labor publications or in its handling of testimony taken in the hearing on the temporary restraining order. Appellants' claim to the contrary is captious. The court below did not refuse to accept the testimony, but left the matter undecided, and appellants took no exception (R. 176-180). Similarly, appellants did not object to the references in brief and in argument to the labor publications which were mentioned by the court in footnote 3 of its opinion (R. 201). More important, the court below was not required to shut its eyes to matter of this kind, which was relevant to the issue before it. *Cf. Brown v. Board of Education*, 347 U. S. 483 at 494, n. 11.

ARGUMENT

1. Section 5(2)(f) is couched in general language and is not susceptible of an interpretation requiring any specific condition; plainly it does not require a job freeze.

Appellants' claim that the plain language of § 5(2)(f) commands a job freeze is untenable. As pointed out *infra*, pp. 37-42, the Commission has for 20 years construed § 5(2)(f) as requiring only compensatory benefits. Also, railway labor contemporaneously interpreted the section the same way and has acquiesced in the Commission construction until the present challenge. Considering that history, one can only wonder where the "plain meaning" requiring a mandatory job freeze has lain hidden from 1940 to 1959.*

The obvious answer is that the language of § 5(2)(f) is not susceptible of the interpretation which appellants would fasten on it. It does not in terms state that employees are to be maintained in their jobs, that jobs cannot be abolished or that there is to be a job freeze. The second sentence of the section, which is the critical portion on which appellants rely, provides in pertinent part simply:

"In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, . . ."

*In particular, appellants' "plain meaning" argument is inconsistent with the position taken by RLEA on brief in *Railway Labor Executives' Association v. United States*, 339 U. S. 142—see pp. 50-51, *infra*.

The court below found no ambiguity in the structure of § 5(2)(f). It stated (R. 199):

"From our reading of 5 (2)(f) we are unable to find a clear expression, as plaintiffs contend, that continued employment of affected employees is required to be imposed. We believe that ordinary everyday logical reading of 5 (2)(f) mitigates against plaintiffs' contention. The phrase here in issue, 'in a worse position with respect to their employment' is couched in such general language as to hardly be susceptible of being interpreted as requiring any specific condition, much less that of guaranteed employment."

That conclusion is clearly correct.

As noted by the court below, appellants' claim to the contrary rests solely on the meaning they would distill from the phrase "being in a worse position with respect to their employment". Appellants seek to read that phrase as requiring that employees be maintained *in* their same or equivalent employment *by the merged carrier*. There are two obstacles to such an interpretation of that phrase. In the first place, the statute does not use the word "*in*"—it uses the comparative "with respect to". Secondly, the statute does not tie the word "employment" to employment with the merged railroad. This use of the comparative and general reference to "employment" makes it appropriate to construe the statute, as the Commission did here (R. 20), as meaning simply that the purpose is to "make certain that the employee's position as it relates to his livelihood is unharmed by the transaction". The statute is thus satisfied by protecting the employee against financial loss on account of dismissal or displacement.

There are other reasons for rejecting the construction which appellants would impose upon the second sentence of § 5(2)(f). A principal reason is that it ignores the statutory requirement that an employee be "affected". Both the

first and second sentences of § 5(2)(f) refer not to employees generally but to those who are "affected" by the merger. It is those employees—the ones who are displaced or dismissed by reason of the merger—who are to be protected. This Court* held in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, 155, that the second sentence of § 5(2)(f) is "a minimum protection for employees adversely affected". Under appellants' construction there will be no "affected" employees during the protective period; for all employees will be retained in their jobs.

This consideration also answers, we submit, appellants' objection that the compensatory New Orleans Conditions do not satisfy the second sentence of § 5(2)(f) because those conditions do not operate until employees have been placed in a "worse position with respect to their employment" by being dismissed or displaced (Br. pp. 2-3). That contention falls, when the word "affected" is read, as this Court has read it, in its normal sense of "adversely affected", because the second sentence of § 5(2)(f) necessarily contemplates that an employee is to be protected when he is "adversely affected".*

Also, contrary to appellants' assertion, the imposition of protection against financial loss does not have the effect of substituting the word "compensation" for the word "employment" in the phrase "being in a worse position with respect to their employment". The New Orleans Conditions protect affected employees against losses in matters which are comprehended within the broader term "employment", but which might lie outside the term "compensation". Thus, the New Orleans Conditions protect employees' pension, hospitalization and similar fringe benefits

*RLEA asked for protection for "all employees adversely affected by the merger" in the proposed conditions it submitted to the Examiner (R. 190).

(R. 157). They also provide reimbursement of moving expenses and protect against loss in the sale of homes (R. 157-159).^{*} When every word in the phrase upon which appellants rely is considered, it is clear that employees are *not* "in a worse position with respect to their employment" when they are receiving equal compensation and fringe benefits even though they are not working.

But the greatest objection to construing the general language of § 5(2)(f) as imposing a job freeze is the fact that when Congress intends such a freeze it uses explicit and self operating terms. Congress did so briefly in the railroad industry, prior to enactment of § 5(2)(f), and subsequently in the telegraph industry. It is instructive to note the differences between the language used in those two statutes and that in § 5(2)(f). The Emergency Railroad Transportation Act of 1933, 48 Stat. 211, which expired on June 17, 1936, flatly provided in section 7(b) that "the number of railroad employees shall not be reduced" as a result of action taken under the Act,

"nor shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

Congress similarly imposed a job freeze in 1943 in connection with mergers of common carriers by telegraph or radio in section 222(f) of the Communications Act (47 U. S. C. § 222(f)), which provides in part as follows:

"(f)(1) Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consoli-

^{*}The adequacy of the New Orleans Conditions is discussed *infra*, pp. 53-57.

dation or merger, and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry."

Those provisions for a job freeze in precise and self operating terms contrast vividly with the general provision of § 5(2)(f) requiring the Commission to "include terms and conditions" so that the merger will not place affected employees "in a worse position with respect to their employment". If a job freeze was intended, why is it left to the Commission to impose "terms and conditions"—why is not the freeze self operating, as in the case of each of the two statutes cited?

But more important than the obvious differences in language and effect is the fact that Congress expressly recognized in 1943 that it was providing greater protection in § 222(f) than it had only three years before in § 5(2)(f).^{*} Thus Senator McFarland, a co-sponsor of § 222(f), stated (88 Cong. Rec. 3415):

"We personally felt that one of the most important provisions in the bill should be the protection of employees. We have, therefore, gone further in this bill to protect the man who has become trained in the telegraph profession from losing his position and seniority than any legislation ever enacted by Congress. . . ."

^{*}Section 222(f) was originally introduced in the 77th Congress (1942) and it was reintroduced and passed in the 78th Congress (1943), 57 Stat. 3.

Senator White, another proponent, agreed (88 Cong. Rec. 3416):

"Mr. President, I agree with the Senator from Arizona that if written into law or made effective as a condition of consolidation these provisions would afford labor security and, advantages obtained through no other legislation upon the statute books."

The same thought was echoed in the 1942 report of the Senate Committee on Interstate Commerce (S. Rep. No. 1490, 77th Cong., 2d Sess., p. 10):

"The committee believes that it has recommended in this legislation the greatest degree of labor-protection requirements yet produced in any legislation . . .".

Senator White later pointed out why the difference between the railroad and telegraph merger situations required going further to protect telegraph labor (89 Cong. Rec. 1195-1196):

"Something has been said about what we have done for railroad labor, and the question is asked why we should do more for the telegraph employees than has been done for railroad employees. I think there is a very basic difference which furnishes a convincing reason for the greater liberality on our part for the telegraph company labor. When a railroad line is abandoned or when its services are curtailed employees affected can go to a hundred other railroads in the country seeking employment. When a corresponding change occurs with reference to a telegraph company, when the Postal Telegraph Co. disappears, there is just one place where the man who has given his life's services to the telegraph industry can go for employment, and that is to the merged company which it is proposed to set up. Because of that narrow market for telegraph labor

I think we are justified in what I concede is liberality."*

When Congress believes a job freeze is necessary it imposes one in clear, specific and self-operating terms. Congress did not do so in the general language of § 5(2)(f) and such a construction cannot be read into it. When all is said and done, the language of § 5(2)(f) is barren of any requirement of a job freeze or any other specific "term" or "condition" governing the exact nature of the protective "terms and conditions" which the Commission is required to impose to protect employees affected by railroad mergers. Under the terms of § 5(2)(f) the Commission was free to impose the compensatory New Orleans Conditions.

2. The legislative history of § 5(2)(f) supports the Commission's holding that the statute requires only the payment of financial benefits to discharged or displaced employees. It certainly does not compel the conclusion that Congress intended to impose a job freeze.

a. Introduction.

With respect to the legislative history of the critical second sentence of § 5(2)(f), appellants are faced with the impossible task of demonstrating that the language of the rejected Harrington Amendment, which provided "that no such transaction shall be approved by the Commission if

*Appellants cannot avoid the force of these authoritative explanations by relying on a statement read by Senator Taft for Senator Hawks in opposition to § 222(f)—see Br. 69-70. As appellants properly caution (Br. 68), "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is to the sponsors that we look when the meaning of the statutory words is in doubt." *Mastro Plastics Corp. v. N. L. R. B.*, 350 U. S. 270, 288, n. 22.

such transaction will result in unemployment or displacement of employees of a carrier or carriers, or the impairment of existing employment rights of said employees", means exactly the same thing as the phrase in the second sentence of § 5(2)(f) that no affected employees shall be "in a worse position with respect to their employment". Such a demonstration, however nimbly and extensively articulated, flies in the face of reality and common sense, particularly since appellants' previous position has long been to the contrary.*

As is often the case with important legislation, the legislative history of the labor protection provisions which evolved as § 5(2)(f) is not a model of clarity. But when attention is focused on the way in which the exact language of § 5(2)(f), and particularly the critical second sentence thereof, was arrived at and explained, these conclusions are appropriate:

(1) The second sentence of § 5(2)(f) was ~~a~~ substitute for a modification of the Harrington Amendment, differing in language and in meaning.

(2) The second sentence of § 5(2)(f) was authoritatively explained to Congress in terms recognizing that employees could be displaced or dismissed during the protective period and that the payment of compensatory benefits would satisfy the statute.

(3) The legislative history accordingly does not "compel" the conclusion that § 5(2)(f) was intended to impose a job or employment freeze. Instead, it sup-

*The "compelling" legislative history argument of appellants, like their "plain meaning" argument, is undermined by the position taken by RLEA on brief in *Railway Labor Executives' Association v. United States*, 339 U. S. 142—see pp. 50-51, *infra*.

ports the Commission's practice of requiring compensatory benefits.

The bases for these conclusions follow.

b. The legislative background and the protective provisions initially submitted to Congress.

The merger provisions of the Transportation Act of 1920 (41 Stat. 456) did not specify any labor protective conditions. In 1933, Congress enacted the Emergency Railroad Transportation Act of 1933 (48 Stat. 211) with the job freeze provision which has been discussed *supra*, pp. 20-23. One of the main purposes of that Act was the promotion of mergers and consolidations in the ailing railroad industry to remove unnecessary duplications of service and facilities. The 1933 Act did not, however, accomplish that purpose and was allowed to lapse on June 17, 1936, one month after railway management and railway labor had established in the Washington Agreement (R. 139-151) a pattern of *compensatory* provisions to alleviate the adverse effects of mergers and the like upon railway labor.

The railroads' continued financial difficulties prompted the President to appoint in September, 1938 a "Committee of Six", the membership of which was equally divided between management and labor, to consider transportation problems and to recommend legislation. The Committee of Six recommended to Congress, among other things, that in the new consolidations section of the Act there be authority to require "a fair and equitable arrangement to protect the interest of the . . . employees".* That language was understood by Congress as assuring to employees affected

*The Committee's recommendation is printed in Hearings Before The Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 2531 (Omnibus Transportation Bill), 76th Cong., 1st Sess. 275 (1939) (hereinafter referred to as House Hearings).

by railroad mergers the compensatory protection of the Washington Agreement.*

With that understanding and in accordance with the recommendation of the Committee of Six and the testimony of RLEA Chairman Harrison, the bill, S. 2009, which became the Transportation Act of 1940 was introduced and

*George M. Harrison, then Chairman of RLEA (and a member of the Committee of Six), appeared before the House Committee to discuss the Washington Agreement and to make recommendations concerning labor protective provisions to be written into the proposed Transportation Act. Mr. Harrison submitted a copy of the Washington Agreement and summarized its terms as follows (House Hearings 241):

"Any employee who is continued in service but is affected by a coordination [e.g., a merger or consolidation] is guaranteed for a period not exceeding 5 years thereafter that he will be in no worse position with respect to compensation and working conditions.

"Any employee who is deprived of employment as a result of a coordination is entitled to receive 60 percent of his average monthly compensation for varying periods of time based upon length of service with the employer . . ." (Emphasis added.)

Moreover, Mr. Harrison urged a continuation of compensatory conditions, as follows (*id.* at 243):

"THE CHAIRMAN. You indicated yesterday that you thought that legislation should be enacted covering this subject.

"MR. HARRISON. Yes, sir.

"THE CHAIRMAN. That agreement [the Washington Agreement], of course, is still in effect.

"MR. HARRISON. That is true.

"THE CHAIRMAN. Has it been satisfactorily maintained?

"MR. HARRISON. Generally speaking, Mr. Chairman, the agreement has been satisfactory.

"So, I would not be here urging that you attempt to do anything different than what we are in agreement with our employers on.

"Now just how you would cover that in the law is a matter that I would want to give some thought to. . . ."

Mr. Harrison testified to the same effect before the Senate Committee on Interstate Commerce. See Hearings before the Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869 and S. 2009, 76th Cong., 1st Sess., 34 and 38.

passed by the Senate on May 25, 1939 (84 Cong. Rec. 6158), with the provision which is now the first sentence of § 5(2)(f), directing the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected".

c. The Harrington Amendment.

When S. 2009 came to the House, its Committee on Interstate and Foreign Commerce substituted its own bill under the Senate number but continued the requirement for "a fair and equitable arrangement" for affected employees. Because of the feared vagueness of that provision, and at the behest of the Brotherhood of Railroad Trainmen, Representative Harrington of Iowa proposed the following amendment from the floor (84 Cong. Rec. 9882):

"Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

That amendment, which appeared to impose a job freeze, and which was completely inconsistent with the preceding provision of the bill requiring a fair and equitable arrangement to protect the "employees affected", was adopted by the House in the bill as passed on July 26, 1939 (84 Cong. Rec. 9887). The bill then went to conference to resolve the differences between the houses.

Strenuous objections were raised to the inclusion of the Harrington Amendment on the ground that a mandatory job freeze would conflict with the basic purposes of the bill. Particularly vigorous in its opposition was the Commission, which argued as follows in a letter and report of

January 29, 1940, from Chairman Eastman to the Chairmen of the House and Senate committees:

"As for the [Harrington] proviso, the object of unifications is to save expense, usually by saving labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 between the railroad managements and labor organizations. The [Harrington] proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees." I. C. C. Report of Jan. 29, 1940, p. 67

d. The rejection of the Harrington Amendment; the Wadsworth motion to recommit.

The conferees were unable to agree upon the Harrington Amendment and avoided the problems it raised by striking the provisions which would have amended the merger provisions of section 5 of the Act.* Thus, the bill as reported out of conference on April 26, 1940, contained no labor protective provisions. The conferees also eliminated two other amendments which had been adopted by the House.

When the Conference Report came before the House, Representative Wadsworth moved to recommit the bill to conference with instructions concerning the three rejected House amendments. As to the rejection of the Harrington Amendment, the motion gave the following instructions to the House Managers (86 Cong. Rec. 5886):

"3. That the managers on the part of the House insist on the inclusion in the report of the committee of conference the provisions adopted by the House relating to combinations and consolidations of carriers (secs. 8 and 22 of the House amendment) but

*See the Conference Report, H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61, reprinted at 86 Cong. Rec. 5854.

modified so that the sentence in section 8 which contains the provision known as the Harrington amendment, read as follows:

“(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment.

“Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.”

It is essential to consider the precise language of the Wadsworth proposal because it clearly demonstrates the error in appellants' contention (Br. 50-51) that the bill was recommended with instructions that the *Harrington Amendment* be insisted upon. A reading of the Wadsworth proposal makes it clear that appellants' equation of the Harrington Amendment with the Wadsworth proposal (which equation is crucial to their position) is erroneous. The Wadsworth recommendation to the House Managers was to insist on the inclusion of the provisions previously adopted by the House “but modified so that the sentence in section 8 which con-

tains the provision known as the Harrington amendment reads as follows", and then contains language completely different from the Harrington Amendment. The only resemblance between the two was that neither contained any time limitation. There is no serious question that the legislation proposed in the Wadsworth motion was not the Harrington Amendment.*

*Appellants lay great stress on the statements of Mr. Harrington and other supporters of the Wadsworth motion as showing that the motion was the same in substance as the original Harrington Amendment. But the radical difference in language suggests that those statements, instead of being intended to be taken at face value, may have been designed for the record, to satisfy constituents in that election year. Even Mr. Harrington in speaking about the Wadsworth proposal referred to the "modified language for labor protection" (86 Cong. Rec. 5869) and later described it simply as "designed to accomplish the purposes intended to be accomplished by the Harrington amendment." (86 Cong. Rec. 5871). Moreover, Representative Wolverton, one of the House Managers, clearly expressed his understanding that the Wadsworth proposal was not the equivalent of the Harrington Amendment (86 Cong. Rec. 5880):

"The fact that the former proponents of the Harrington amendment have now abandoned it and now ask the House to adopt another and different kind in its place, as set forth in the proposed Wadsworth motion to recommit, certainly makes clear a lack of confidence in the former amendment and further justifies the action taken by the conferees in removing the whole controversial subject from the bill and leaving it for further study by the board which is to be set up to study the transportation problem."

He repeated the same idea immediately prior to the vote on the Wadsworth motion to recommit in the following colloquy (86 Cong. Rec. 5885):

"Mr. WOLVERTON of New Jersey. Will the gentleman make clear that the motion to recommit which it has been suggested will be made by the gentleman from New York (Mr. Wadsworth) does not contain the Harrington amendment?"

"Mr. BULWINKLE. I did not know that. I thought it would contain the Harrington amendment."

"Mr. WOLVERTON of New Jersey. It is an entirely different amendment. It seems as if the Harrington amendment proponents have made an additional suggestion."

The House adopted the motion to recommit and the bill went to a second conference with the Wadsworth modification (86 Cong. Rec. 5886).

e. The Second Conference.

The second conference produced § 5(2)(f) in its present form, including the critical second sentence. Accordingly, it is to the Conference Report and the explanation given by the conferees that resort must be had to understand what was intended, for they were the authors of the final language, not Mr. Harrington or the supporters of the Wadsworth motion to recommit, as appellants seem to think. Two crucial facts emerge:

1. The second sentence of § 5(2)(f) as adopted by the second conference was not the Harrington Amendment, nor even the change thereof made by the Wadsworth motion. It was a substitute and was described as such in the Conference Report and in the explanation given by the House Managers and by Senator Wheeler who, as Chairman of the Senate Committee on Interstate Commerce, was in charge in the Senate. Thus the Conference Report stated (H. R. Rep. No. 2832; 76th Cong., 3d Sess., p. 69, reprinted in 86 Cong. Rec. 10167):

"The House amendment included a proviso (the Harrington amendment) prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provision in the Senate bill. In lieu of this proviso, the following provision has been included in the conference substitute: [there follows a quotation of the language of § 5(2)(f) as passed]"

Representative Lea, who as Chairman of the House Committee on Interstate and Foreign Commerce was the

principal Manager on the part of the House, described § 5(2)(f) as adopted by the conference as "The substitute that we bring in here" (86 Cong. Rec. 10178). Similarly, Senator Wheeler twice explained to the Senate that the second conference was reporting "out the bill with substitutes for the Jones and Harrington amendments" (86 Cong. Rec. 11270, 11766) and further that the conference "agreed to a compromise on the Harrington amendment" (86 Cong. Rec. 11625). Indeed, because of these "compromises" Representative Wadsworth, the author of the House motion to recommit with instructions, raised a point of order against the second Conference Report for failure to follow the instructions of the House (86 Cong. Rec. 10174). The reality of Mr. Wadsworth's complaint is readily apparent from comparison of the second sentence in his motion with the second sentence of § 5(2)(f) as adopted by the conference and enacted. Not only was protection limited to a maximum of four years. There was also added the requirement that the employees be "affected".

2. The second crucial fact is that § 5(2)(f) was explained to Congress in terms which showed it could be satisfied by the payment of financial benefits to persons dismissed or displaced during the protective period. Thus, the second Conference Report gave this explanation (86 Cong. Rec. 10167):

"In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation,

and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation."

The words "benefits to employees will be required to be paid" certainly imports an intention to require compensatory benefits.

That explanation was elaborated and confirmed by Representative Lea, the principal House Manager. He stated that "employees have protection against *unemployment* for 4 years, but the Commission is not required to give them *benefits* for any longer period." (86 Cong. Rec. 10178, emphasis added). Then he gave unequivocal answers to questions from the House floor raising the very issue involved in this case (*ibid.*):

"Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean if a consolidation were made there would still be a 4-year period during which the man would be paid?"

"Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

"Mr. VORYS of Ohio. That would be whether or not they were still employed?"

"Mr. LEA. Yes."

"Mr. O'CONNOR. Mr. Speaker, will the gentlemen yield?"

"Mr. LEA. I yield to the gentleman from Montana."

"Mr. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his

employment. Does 'worse position' as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

"Mr. LEA. I take that to be the correct interpretation of those words. . . ."

The second sentence of § 5(2)(f) was thus authoritatively explained as not delaying consolidation and as requiring continuance for the protected period of the same compensation to employees who lose their jobs as a result of consolidation.*

Mr. Lea's explanation was confirmed by the other House Managers** who discussed the scope of § 5(2)(f) in the course of the House consideration of the second Conference Report, for they also used language to the effect that compensatory benefits satisfied the statutory command.

*This requirement of full compensation for dismissed employees disposes of appellants' argument that, since the first sentence of § 5(2)(f) authorizes compensatory protection, something more than compensation is intended under the second sentence. As previously shown, the first sentence contemplated imposition of the Washington Agreement which provided for only 60% compensation to dismissed employees—pp. 25-27 *supra*. In the light of the explanation given by Mr. Lea it is more reasonable to read the second sentence of § 5(2)(f) as intended to give more definite and greater compensatory protection—i.e., full compensation up to a maximum of four years.

**The House Managers were Representatives Lea, Crosser, Bulwinkle, Cole, Wolverton, Holmes and Halleck. Only Representatives Lea, Wolverton and Halleck explained § 5(2)(f) in detail. However, Representative Crosser made the following general statement showing his understanding that the conference substitute differed from the Harrington Amendment (86 Cong. Rec. 10192):

"I do not hesitate a moment in saying that the revised provision contained in the present conference report is more advantageous to railroad workers than was the amendment of the gentleman from Iowa [Mr. Harrington]. . . ."

It is interesting to compare this statement with the Commission's report, *supra*, p. 28, that the Harrington Amendment "in the long run will do more harm than good to the employees."

Representative Halleck explained that § 5(2)(f) followed the principle of the Washington Agreement, which of course provided only compensatory benefits for dismissed or displaced employees (86 Cong. Rec. 10187):

"As to the Harrington amendment, I do not know what the author of that amendment is going to do about this bill, but I do know and understand that the people whose cause he so valiantly championed are not objecting to this provision as it is now written. It follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation. This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law."

Representative Wolverton, the third House Manager who spoke to the point, also stated in his explanation of the conference compromise that financial assistance was intended (86 Cong. Rec. 10189):

"The conferees have struggled long and hard to agree upon language that would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that it is acceptable to all who are to be affected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. Nor should anyone overlook the fact that the adoption of this amendment

as agreed to by the conferees gives railroad workers protection against sudden dismissal and financial assistance that is not enjoyed by workers in any other industry."

These explanations in terms of "benefits to be paid", whether or not persons were still employed, and financial assistance, cannot be brushed aside, as appellants seek to do. (Br. 78-80), as informal or uninformed statements by opponents of the legislation. They constitute the considered explanation given by the conferees, who were the authors of the language in the conference compromise and responsible for the bill.

Significantly, during the consideration of the second Conference Report in both houses, no one challenged the explanation of the second Conference Report as requiring financial benefits or the above described statements of the House Managers. There was no assertion that § 5(2)(f) imposed a job freeze. See generally the proceedings on the second Conference Report in the House (86 Cong. Rec. 10146-10194) and in the Senate (86 Cong. Rec. 11269-11294, 11537-11547, 11610-11631, 11634-11639, 11758-11769).*

The legislative history of § 5(2)(f) thus simply does not compel the conclusion that the second sentence as enacted is the same as the original Harrington Amendment and imposed a job freeze, limited however to four years. Instead, the proper conclusion is that the second sentence is intended to provide a system of compensatory benefits for employees dismissed or displaced because of railroad mergers. And, if anything more could be needed to show *

*We agree with appellants that, given their interpretation of the legislative history of § 5(2)(f), it is ironic that Mr. Harrington voted against the second Conference Report. However, contrary to the implication in appellants' brief (n. 71, p. 68), Mr. Harrington did not state during consideration of the Report why he voted against it.

that a job freeze was not imposed by § 5(2)(f), it is furnished by the contrast drawn three years later, in 1943, between the railroad and telegraph situation in connection with the job freeze imposed in § 222(f) of the Communications Act—see pp. 20-23, *supra*.

3. Appellants' job freeze contention must be rejected because of the Commission's contemporaneous and continuing construction of § 5(2)(f), as requiring only compensatory conditions, an interpretation moreover in which appellants have heretofore joined.

From the foregoing analysis of the plain meaning and legislative history of § 5(2)(f), it is evident that the Commission's understanding of the section as requiring compensatory benefits is entirely correct. The Commission has so construed the section from the time of its enactment in 1940 to the present. The Commission has *never* imposed the job freeze which appellants now belatedly urge as the inflexible statutory requirement for all mergers.

The Commission first imposed compensatory conditions in two cases in 1941. *Cleveland & Pittsburgh Railroad Company Purchase*, 244 I. C. C. 793, 796, (1941) and *Texas & P. Ry. Co. Operations*, 247 I. C. C. 285, 294-295 (1941). Promptly thereafter the Commission advised Congress in its 55th Annual Report in 1941 that its practice was to impose compensatory conditions under § 5(2)(f) for displaced and discharged employees (p. 61):

"Briefly, the conditions require that during the protective period provided in paragraph 2(f) of the act, a displaced employee—that is, one who is retained in service by the applicants but placed in a worse position with respect to his compensation and the rules governing his working conditions—should

be paid a displacement allowance; that any employee deprived of employment should be paid a dismissal allowance; and that no employee should be deprived of benefits other than wages attached to his previous employment, such as free transportation, hospitalization, et cetera. . . ."

Since then the Commission has continued to impose only compensatory conditions in § 5(2)(f) cases involving hundreds and hundreds of employees.* Significantly, as the court below noted (R. 202), Congress "has not seen fit to indicate by any attempted clarification of the Act its disagreement with the construction uniformly placed upon it in the intervening years."

The consistent position heretofore taken by railway labor further reinforces the correctness of the Commission's practice of imposing compensatory conditions under § 5(2)(f). Like the Commission, railway labor in its official publications contemporaneously construed § 5(2)(f) as requiring compensatory conditions, not a job freeze. Those publications are cited in footnote 3 of the opinion

*See, for example, *Louisville & N. R. Co. Merger*, 295 I. C. C. 457 (1957), where the merger contemplated abolishment of approximately 550 jobs and the transfer of an additional 289 people.

Other illustrative cases in which the Commission imposed only compensatory conditions include: *Chicago M. St. P. & P. R. Co. Trustees Construction*, 252 I. C. C. 49, 252 I. C. C. 287 (1942); *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, 197-201 (1944); *New Orleans Passenger Terminal*, 267 I. C. C. 763 (1948), *aff'd sub. nom., Railway Labor Executives Ass'n v. United States*, 84 F. Supp. 178 (D. D. C. 1949), *rev'd on other grounds*, 339 U. S. 142, *on remand*, 282 I. C. C. 271 (1952); *International-Great Northern Railroad Company Trustee Trackage Rights*, 275 I. C. C. 27 (1949); *St. Louis Southwestern Railway Company of Texas—Lease*, 290 I. C. C. 205 (1953); *Louisiana and Arkansas Railway Company Abandonment, etc.*, 290 I. C. C. 434 (1954); *Wellsville, Addison & Galetton Railroad Corporation Purchase and Control*, 295 I. C. C. 115 (1955); *Norfolk & Western Railway Company and the Virginian Railway Company*, I. C. C. Finance Docket No. 20599 (1959).

below (R. 201), and include the October, 1940, issue of the *Journal* of the appellant Brotherhood. Of particular interest here is the interpretation stated in that *Journal* of § 5(2)(f) as requiring four years' pay for employees who lose their jobs because of a merger:*

"Another important bill has already become law. It is the Wheeler-Lea Transportation Act, containing two main provisions:

* * *

"FOUR YEARS' FULL PAY"

"2. The law provides that any employee who has been in the service of a railroad four years or more, and loses his job because of a merger or 'coordination', must be paid his full wages for four years. If he has been a railroad employee less than four years, he must be paid his full wages for a period as long as his previous service.

"No such protection and compensation have ever been guaranteed by law to the employes of any other industry, and the railroad workers secured these un-

*Volume XLIX, Brotherhood of Maintenance of Way Employees *Journal*, October, 1940, at pages 13, 14. Appellants' contention (Br. 83, 85) that the District Court should not have considered those publications and their citation of *United States v. United Mine Workers of America*, 330 U. S. 258, 281-282, for that contention is simply incomprehensible. The contemporaneous understanding of the meaning of legislation expressed by those most directly affected by it is certainly relevant to the question of construction and nothing in *Mine Workers* holds to the contrary. See *infra*, pp. 58-59.

Appellants cannot escape the impact of such contemporaneous interpretations by attempting to shrug them off as the expressions of "a small minority of the railroad brotherhoods, and at that, brotherhoods which had *opposed* the Harrington amendment . . ." (Br. 18, 83), particularly when one of them is the appellant brotherhood in this case. As previously stated, the Harrington Amendment was prompted by the Brotherhood of Railroad Trainmen. It alone among the rail unions opposed the report of the Committee of Six and urged Congress to prevent mergers and consequent reduction in rail employment. Just before the vote was taken on the Harrington Amendment in the House, it was pointed out that the remaining 20 railway brotherhoods favored the bill without the Harrington Amendment (84 Cong. Rec. 9887).

precedented benefits through the Brotherhood of Maintenance of Way Employees, in a cooperative movement with the other Standard Railroad Labor Organizations."

Also highly persuasive is the course followed by RLEA. Until the present challenge, RLEA not only acquiesced in the Commission's practice but also actively agreed to compensatory protection for the workers it represents in scores of § 5(2)(f) proceedings, including six recent ones involving the Erie and the Lackawanna.* Also, in 1950, as more fully discussed *infra* pp. 50-51, RLEA stated to this Court in its brief at p. 55 in *Railway Labor Executives' Association v. United States*, 339 U. S. 142, that the minimum requirements of the second sentence of § 5(2)(f) were satisfied by compensatory conditions.

In short, from 1940 to 1959 we have a history of railway labor (1) supporting the Commission's practice of prescribing compensatory conditions, (2) negotiating with

- * (1) Finance Docket No. 19989 Involving the coordination of facilities of Erie and Lackawanna between Binghamton, New York, and Gibson, New York, a distance of 75.76 miles, on August 31, 1959, and affecting some fifty employees.
- (2) Finance Docket No. 19118 Involving the discontinuance of Lackawanna's 34.9-mile Ithaca Branch in 1956.
- (3) Finance Docket No. 20075 Involving the abandonment of Lackawanna's Hampton branch in 1958.
- (4) Finance Docket No. 20008 Involving coordination of the facilities of the Erie and Lackawanna in Paterson, New Jersey, the Commission's decision being dated February 15, 1960.
- (5) Finance Docket No. 21169 An application filed June 17, 1960, involving the discontinuance of Lackawanna's 18.31-mile Cincinnati branch, hearing on which was held November 15, 1960.
- (6) Finance Docket No. 19182 Involving the Hoboken coordination of facilities between Erie and Lackawanna effective October 13, 1956, and March 25, 1957, which affected 273 employees.

railway management in the articulation and development of those conditions and variations thereof (such as the Burlington Conditions, the Oklahoma Conditions and the New Orleans Conditions), and (3) construing and applying these conditions in individual cases through the so-called Section 13 Committee.* This history completely refutes appellants' contentions as to the "plain meaning" and "compelling" legislative history of the statute. The second sentence of § 5(2)(f) is not a chameleon; it does not prescribe compensation in 1940 and 1950 and suddenly in 1959 require preservation of employment as a minimum condition. The present number of mergers pending or contemplated does not change the meaning of § 5(2)(f)—it remains the same whether the employees involved are hundreds or thousands.

Indeed, § 5(2)(f) is part of a comprehensive statute designed to encourage mergers. See *infra*, pp. 42-48. In the light of the past history of railway labor's attitude toward the second sentence of § 5(2)(f), appellants' explanation of the reason for the change in position as to the minimum command of that sentence is wholly unconvincing. If they are correct in their new assertion that the minimum requirement is the preservation of jobs, not compensation, they have given away the *minimum* rights of labor in case after case in the past. We submit that appellants' newly asserted position stands exposed for what it is—an attempt to get the job freeze which Congress rejected in 1940. Appellant's thus pose a question of policy for the Congress, not a matter of construction for the courts.

The Commission's interpretation of § 5(2)(f) as requiring only compensatory benefits, being reasonable, contemporaneous and long continued, and having been supported

*This joint committee of representatives of management and labor to review disputes as to the application of compensatory conditions was established pursuant to Section 13 of the Washington Agreement (R. 150).

by railway labor until the present challenge, is entitled to great weight and should be upheld. *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 549; *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 681-682; *Boutell v. Walling*, 327 U. S. 463, 469-471; *FTC v. Mandel Brothers*, 359 U. S. 385, 391.*

4. Appellants' job freeze contention conflicts with the Congressional policy of fostering an efficient and financially sound railroad system.

Although the foregoing analysis completely disposes of appellants' contention for a job freeze construction, there is yet another reason which compels rejection of that novel claim. The preservation of unneeded jobs raises what may well be an insuperable obstacle to railroad mergers,* and thus conflicts with Congress' encouragement of rail mergers as an appropriate means of achieving its declared policy of promoting economical and efficient service and fostering sound economic conditions in transportation.**

*Indeed, RLEA has publicly announced its opposition to all mergers. See *New York Times*, Dec. 26, 1960 (P. 26, Col. 6, Late City Ed.); *Wall Street Journal*, Dec. 27, 1960 (P. 2, Col. 3, Final Ed.); *Traffic World*, March 18, 1961 (P. 27, Col. 3).

**The National Transportation Policy, adopted as part of the Transportation Act of 1940 reads as follows (49 U. S. C. preceding section 1):

"It is hereby declared to be the national transportation policy of the Congress * * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

and further provides that

"All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

This Court is familiar with the recurrent financial difficulties of the railroads and the policy of Congress to keep them in a sound financial condition.

Thus, as this Court said in commenting on the changes made by the Transportation Act of 1920 (41 Stat. 456), "It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public." *Texas v. United States*, 292 U. S. 522, 530. Similarly, in *Seaboard R. R. v. Daniel*, 333 U. S. 118, 124-125, it was said, "Congress has long made the maintenance and development of an economical and efficient transportation system a matter of primary national concern. Its legislation must be read with this purpose in mind."

The Court is also familiar with the fact that over the years, as the railroad industry has experienced periodic financial crises, Congress has placed a continuing emphasis on appropriate mergers as a means of maintaining a sound railroad industry in the public interest. The first enunciation of that policy was in the Transportation Act of 1920 (41 Stat. 456), which was adopted in the light of the financial difficulties experienced during World War I. Under that Act the Commission was directed to prepare a plan for the consolidation of the railroads into a limited number of systems. Such an approach did not prove feasible. Accordingly, and in view of the plight of the industry during the depression when about one-third of the railroad mileage (including Erie) was in bankruptcy or receivership, Congress, by the Transportation Act of 1940, amended section 5 of the Act to its present form. Under that Act the form and initiation of mergers is left to the railroads subject to the approval of the Commission on several conditions, including § 5(2)(f). As this Court has stated, the "congressional purpose in the sweeping revision" thus made in section 5 "was to facilitate merger and consolidation in the

national transportation system." *County of Marin v. United States*, 356 U. S. 412, 416-417.*

Appellants do not, and cannot, claim that their job freeze thesis will facilitate mergers. In fact, they admit that under their view "the full benefits of the merger may be partially and temporarily postponed" until such time as natural attrition eliminates surplus jobs (Br. 25; R. 71). Of course, neither merger nor economical transportation is encouraged by a job freeze principle which, for a period of up to four years, may require keeping unnecessary people in unnecessary jobs with attendant confusion and safety problems and inevitable erosion of morale and work standards. It was for those reasons, among others, that the Commission rejected appellants' contention, saying (R. 26):

"Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

And the court below, in upholding the Commission, stated (R. 202-203):

"... A requirement that carriers retain employees following mergers would sterilize provisions of the

*The failure of the railroad industry to avail itself fully of the merger authority enacted in 1940 came under Congressional criticism in connection with the Transportation Act of 1958, 72 Stat. 568, which, among other things, authorized the Commission to guarantee loans to railroads in an aggregate amount not to exceed \$500 million. The report of the Senate Committee on Interstate Commerce on the bill which became that Act states:

"The railroad industry has not, in the subcommittee's opinion, been sufficiently interested in self-help in such matters as consolidations and mergers of railroads; * * *"

S. Rep. No. 1647, 85th Cong., 2d Sess., p. 11 (1958).

Act which is designed to promote economy partially through the reduction of personnel."

The important consideration here is that under appellants' job freeze construction an obstacle to rail mergers can exist—that as appellants admit, under their claim, "the full benefits of the merger may be partially and temporarily postponed". The question here is not whether the obstacle exists in every situation, or how great or slight it may be in a particular case, or what the precise effect may be on Erie-Lackawanna. That is so because appellants are seeking a rule of general application—the preservation of all jobs, as a matter of law, for up to four years as a *minimum* condition in all rail mergers.

Appellants try to minimize this obstacle by suggesting that under their claim the benefits of the merger will be postponed only to a "limited extent" because surplus employees "will be absorbed and swiftly eliminated by natural attrition" (Br. 25).^{*} In truth the effect on Erie-Lackawanna will be serious for two reasons.

First, attrition is not the happy solution appellants imply it to be. This is readily apparent from the nature of attrition itself. Employees simply do not die, retire, resign or get fired in such a uniform and constant way that openings are automatically and continuously created in the right

^{*}Appellants refer in this connection to estimates in the Wyer report (R. 112) as to jobs to be abolished and jobs which would be created by attrition during the first five years following the merger. Conditions have changed so radically since that report was prepared that the estimates in it can no longer be relied upon as indicating how the merger will affect employees. Those estimates were based upon the 1956 employment level of 28,000 and the average attrition for 1954, 1955 and 1956. Since then the number of employees has declined over 25%, to a level of 20,318 in February, 1961, for reasons extraneous to the merger such as automation, declines in revenue and traffic, and the current economic situation, all of which has to be considered in determining what effect the merger will have on employees.

places and at the right times for persons whose particular skills would otherwise be surplus. Because of the human variables involved, attrition simply does not "fit" to solve the problem of creating openings for unneeded employees, except over some appreciable period of time. In addition, agreements with the unions significantly inhibit labor mobility through craft boundaries and seniority divisions.

The experience of Erie-Lackawanna indicates that attrition is no more than a partial solution even over the maximum four year period of the second sentence of § 5(2) (f). Thus, in its Hoboken coordination, under which 273 employees received the benefit of the New Orleans Conditions, there were still 16 employees at the end of the four year period, in three different classifications, for whom attrition had not made comparable jobs available. Also, based on experience, it is estimated that, in the case of 128 line clerk positions which Erie-Lackawanna currently plans to eliminate, attrition will create openings for only 84 over the four years, leaving a surplus of 44 at the end of that period if the positions must be maintained. See the affidavit of Garret C. White, Vice President-Operations of Erie-Lackawanna, printed as Appendix A.

It may well be that attrition will work more satisfactorily and rapidly in some other classifications and that it could ever conceivably solve the problem in a few. To the extent that attrition works, however, it works as well under the New Orleans Conditions as under a job freeze. As suitable openings are created, employees drawing compensatory benefits will be called back in order of their seniority. This is not only plain economics; it is also required by collective bargaining agreements.

The second, and more serious, consequence to Erie-Lackawanna of a job freeze is the inability to plan during the time that it inevitably takes for attrition to work. Under the present restraint, Erie-Lackawanna, although techni-

cally merged, is in effect operating two railroads, with two sets of employees and costly duplication of operations and physical facilities.* The planning and implementation of the merger of Erie-Lackawanna is a complex and difficult matter at best. However, once freed of the present restraint, Erie-Lackawanna will be able to proceed promptly with orderly implementation of the merger under the New Orleans Conditions. In accordance with the well defined procedures which have been developed to assure financial protection under those Conditions, unneeded facilities can be closed, operations can be consolidated, employees can be transferred, and unneeded employees can be dismissed.

In contrast with the well established procedures under the New Orleans Conditions, there are no guides to implementation of appellants' job freeze. A host of questions arises from the variety of ways in which their contention has been expressed—*e.g.*, "complete preservation of employment" (R. 190)—"freeze the employment situation" (R. 181)—"equivalent employment" (Br. 3)—"comparable work" (Br. 11)—"a continued active employment status substantially comparable" to that held prior to merger (Br. 14)—work may be transferred but employees must be allowed "to follow that work" (Br. 25).

For example, can unneeded facilities be closed and operations consolidated? If a station is no longer needed, must Erie-Lackawanna nevertheless keep it open so that the station clerk may be "maintained" in his employment there, or can the station be closed, with the clerk staying at home and being continued technically in an active employment status? Or can the clerk be moved to another station where he is not needed? Must employees who are not needed by the railroad be given something to do? Must useless work be

*See the White affidavit printed as Appendix C. at pp. 36a-37a, of our Memorandum of February 3, 1961, responding to the Jurisdictional Statement.

created? Or is the available work to be divided and, if so, what effect will that have on the established work rules which define what duties an employee is expected to perform in how many hours in any given work day? (The struggle in the railroad industry over such rules is well known.) What is a comparable job—does it include a better job?

Other questions suggest themselves, but enough has been said to indicate the dimension of the problem. Planning would be difficult and implementation uncertain and piecemeal while attrition works its haphazard way. The benefits of the merger would be postponed and Erie-Lackawanna would probably become a public charge either through Federally guaranteed loans or bankruptcy.*

The job freeze for which appellants contend as a minimum condition in all transactions under § 5(2) of the Act necessarily and admittedly postpones the full benefits of the merger until such time as attrition catches up with ensuing delay and practical difficulties of the sort suggested above. It must be rejected as inconsistent with the Congressional policy of facilitating rail mergers in the public interest.

5. Prior decisions of this Court do not support appellants' job freeze construction; to the extent they are relevant, they support the Commission's construction.

Appellants argue (Br. 70-75) that their job freeze construction of the second sentence of § 5(2)(f) was explicitly recognized by this Court in two cases—*Railway Labor Executives' Association v. United States*, 339 U. S. 142, and *Order of Railroad Telegraphers et al. v. Chicago and North Western Ry.*, 362 U. S. 330. They try to

*See the White affidavit at pp. 37a-39a of our memorandum of February 3, 1961, responding to the jurisdictional statement.

support that thesis by isolated bits of language in those opinions. However, the opinion of the court in *RLEA* refutes appellants' construction; and the question of what § 5(2)(f) requires was not reached by the Court in *Telegraphers*.

RLEA arose out of the Commission order, dated May 17, 1948, authorizing the construction of the New Orleans passenger terminal and related railroad lines, and the abandonment of certain others. No abandonment of existing facilities was to be effected, however, until the authorized construction had been completed, which was to be by December 31, 1954. Thus it was clear that the majority of employees "adversely affected" by the transaction would not be so affected within four years after the Commission order.

In that order, the Commission, under § 5(2)(f), had imposed terms and conditions designed to protect employees for four years from the date of its order. The nature of those terms and conditions is clear. They were *compensatory*. 339 U. S. at 144. It was thus in terms of "compensatory protection" for "displaced" employees that the question was presented whether § 5(2)(f) gave the Commission

"the power to *extend* the period of protection of the interests of the railroad employees beyond four years from the effective date of the order." 339 U. S. at 143. (Emphasis added.)

The Court held that the Commission did have such power, concluding that the 4-year period specified in the second sentence of § 5(2)(f) applied to that sentence only and consequently did not place a time limit on the protection which the first sentence of the section enjoined the Commission to impose.

The significance of *RLEA* is not to be found in the Court's study of legislative history undertaken to discover

whether the 4-year limitation in the second sentence of § 5(2)(f) was intended to apply to the first sentence as well. Rather, this case is important now because the subject of the controversy was the extent of "compensatory protection" for railroad employees "displaced" by a section 5(2) transaction. 339 U. S. at 144. The "plain meaning" and "compelling" legislative history which appellants now argue require a job freeze were less than plain and compelling in 1950.

Thus in its Brief to this Court in *RLEA v. United States*, RLEA stated:

"As will become clear upon examination of the legislative history, *infra*, Congress sought to give railroad employees legislative assurance that in the event of job dismissals and displacements due to coordination transactions, they would receive protection in the form of compensatory allowances in order that they might economically adjust themselves. This was the only type of protection which the Commission had afforded under its discretionary powers prior to the enactment of Section 5(2)(f), and it was the protection which Congress sought to continue by making it mandatory." Brief for the RLEA pp. 19-20, No. 337, October Term, 1949, *Railway Labor Executives' Association v. United States*, 339 U. S. 142.

RLEA may seek to explain away this previous position by pointing out that at page 12 of the same brief it called attention to the fact that the first two sentences of § 5(2)(f) had different origins and purposes and that the second sentence "provides specific protection both of type and extent The specific type of protection is that the employee shall not be in a 'worse position' with respect to his employment". However, nowhere in that brief did RLEA ever suggest that the second sentence required the preservation of jobs as a minimum condition to the

approval of all transactions under section 5(2) of the Act. Indeed RLEA admitted at page 55 of that brief that "the minimum requirements of the second sentence of the section" are satisfied by compensatory conditions, a position which is completely inconsistent with its assertion here that the second sentence of § 5(2)(f) now requires a job freeze as a minimum condition.

More important, however, the Court agreed with appellants' 1950 compensation construction of the requirements of § 5(2)(f). Thus, it noted with approval that

"employees displaced through the early elimination of grade crossings or otherwise may receive compensatory protection up to [4 years after the effective date of the Commission's order]. . . ." 339 U. S. at 154.

Moreover, the Court further confirmed its understanding that compensatory protection satisfied the command of § 5(2)(f) in its discussion of other Commission proceedings. 339 U. S. at 154-155. While it declined to follow the precedents established by those proceedings (339 U. S. at 154, n. 17), the Court did not in any way criticize them. Rather, it found them irrelevant because in them

"the Commission did not eliminate all compensatory protection as it has for many employees here." 339 U. S. at 155.

Thus, if a job freeze is indeed required as a minimum by the second sentence of § 5(2)(f), neither the parties nor the Court found that meaning "plain" or "compelled" by the legislative history in 1950.*

Nor can appellants derive support from *Telegraphers*. The primary issue in that case was whether a railroad had

*RLEA adhered to its position in its Reply to Petition for Rehearing at p. 3: "The basic purpose of Section 5(2)(f) undeniably was to give railroad workers dismissed and displaced as a result of carrier consolidation . . . a measure of protection through compensatory benefits. . . ."

a statutory duty to bargain concerning a union's demands that a job freeze be written into their collective bargaining agreement. The Court held that the railroad was so obligated.

Appellants seek support from *Telegraphers* by seizing upon a statement in the dissent of Mr. Justice Whitaker (joined by Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Stewart):

"Of the Harrington proviso this Court said in the *Railway Labor Executives Ass'n v. United States*, 339 U. S. 142; that it 'threatened to prevent all consolidations to which it related [but Congress] . . . made it workable by putting a time limit upon its otherwise prohibitory effect' . . . But Congress actually did more. It eliminated any power to freeze existing jobs." (362 U. S. 332 at 356-7).

Appellants reason that since the dissent took the position that Congress eliminated the power to freeze jobs, the majority must necessarily have taken a position diametrically opposed. Not only is appellants' logic faulty, but a reading of the majority opinion clearly shows that the Court did not in fact take such a position. Rather, the Court found it necessary to go no farther than to note that § 5(2)(f) recognized that

"stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system", 362 U. S. at 337,

and that no policy elsewhere expressed in or inferred from the Act made illegal a demand to bargain for a job freeze. We submit that the Court did not in terms or by necessary implication decide that the second sentence of § 5(2)(f) required preservation of jobs as a minimum condition to the approval of mergers under § 5(2) of the Act.

In summary, then, the prior decisions of this Court confirm the Commission's consistent interpretation of the statute.

6. **The adequacy of the New Orleans Conditions is not in issue. In any event, they are adequate, and any possible question in that regard is eliminated by the undertakings given herein by Erie-Lackawanna.**

Although appellants make no separate point of the matter, they indicate from time to time that the New Orleans Conditions provide only partial compensation in that they do not protect against the loss of annuity rights under the Railroad Retirement Act or provide for reimbursement of moving expenses if an employee is required to move more than once by virtue of the merger (see, *e.g.*, Br. 8, 21, 23-24). Complaint is also made that those conditions do not protect against loss of seniority rights, "bumping", and permanent loss of employment in the railroad industry (Br. 10, 21-24).

However, no attack was made on the adequacy of the New Orleans Conditions in those or any other respects in the proceedings before the Commission. The whole thrust of RLEA's position was that § 5(2)(f) required the preservation of jobs as a minimum, and could not be satisfied by any system of compensatory benefits alone. Instead of attacking the New Orleans Conditions as compensatorily inadequate, RLEA proposed including them in the job freeze provision it urged (R. 188-190). Since the adequacy of the New Orleans Conditions was thus not in issue before the Commission, it is not before this Court. *United States v. Western Pac. R. R.*, 352 U. S. 59, 62-65; *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U. S. 411, 416-422. However, we do not stand on this proposition alone. In its order of approval the Commission retained jurisdiction for the purpose "of making such further order or orders herein as hereafter may be necessary or appropriate" (R. 32), and conceivably further resort might be had to the Commission if a serious question of adequacy exists. Because of its financial situation Erie-Lackawanna

is anxious to proceed with the merger and to avoid unnecessary delay. Accordingly, we proceed to discuss appellants' complaints about the New Orleans Conditions; we submit that they are so insubstantial that it is appropriate to eliminate them as a point of contention by the undertakings which Erie-Lackawanna gives as hereinafter stated.

Two of appellants' complaints are wrong:

(1) The New Orleans Conditions do not cause loss of seniority rights or "bumping". The creation and retention of seniority rights is governed by the terms of collective bargaining agreements. Under the collective bargaining agreements which Erie-Lackawanna has, with one minor exception, employees retain their seniority rights even though laid off. That is true, for example, under the agreements with appellant Brotherhood which were introduced at the hearing on the temporary restraining order below (R. 118, 126, 130-131, 135-136). Bumping is the result of the union seniority system and exists whether compensatory conditions or a job freeze is imposed for the protection of employees. Even in the case of a job freeze, there will be "bumping upward" as jobs become available through the process of attrition. Appellants' fear of repeated moves by employees as the result of bumping is overstated in the extreme. Orderly implementation of the merger under the New Orleans Conditions and the necessity for working out the details in bargaining with labor preclude the spectre of repeated moves which appellants raise and reduce the matter to the point that Erie-Lackawanna is willing to pay for any additional moves as hereinafter stated.*

*It would seem apparent that bumping and moves will be more frequent if changes are made piecemeal and by chance as attrition sporadically provides an opening, now here and now there, for individual employees, than if consolidation is effected on a group basis pursuant to a rational plan under the New Orleans Conditions.

(2) Similarly, the New Orleans Conditions do not cause loss of accumulated annuity rights under the Railroad Retirement Act. Erie-Lackawanna has heretofore been advised by the Railroad Retirement Board that, in accordance with General Counsel's Opinion L. 54-308 New Orleans Terminal Case, compensation under the New Orleans Conditions is subject to contribution for railroad retirement purposes. Thus, an employee who is furloughed and draws benefits under the New Orleans Conditions is in the same position as a man in active employment status so far as railroad retirement benefits are concerned. The fears expressed by appellants as to the loss of annuity rights under the Railroad Retirement Act arise, not from the New Orleans Conditions, but from the fact that the protective period under the second sentence of § 5(2)(f) is a maximum of four years, while the period required for full coverage under the Railroad Retirement Act is ten years. Thus, if an employee has less than six years' service when he is laid off because of the merger, and he is thereafter protected for four years by compensation under the New Orleans Conditions, he would not have the total of ten years required for full coverage under the Railroad Retirement Act. But this would likewise be true with respect to the same employee if he should be protected by a job freeze for the four year period and then discharged. In neither case would he achieve ten years for Railroad Retirement Act purposes. That does not mean that his annuity rights are lost, for his account is then transferred to the social security system.

No system of compensatory conditions can protect against possible permanent loss of employment in the railroad field, nor can a four-year job freeze. Only a permanent job freeze can do that. However, if attrition works as well as appellants suggest that it will, the possibility of permanent loss which appellants fear will not arise.

There remains for consideration appellants' complaint that the New Orleans Conditions are deficient in that they compensate only for the first move required by the merger and do not provide compensation for any subsequent moves. The one move limitation is consistent with the language of the Washington Agreement, which provides in paragraph 11(b) (R. 149):

"Changes in place of residence subsequent to the initial change caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this Section."

It seems clear that the Washington Agreement contemplated that coordinations and consolidations would require *only* one move and that orderly procedure would make it unusual to be shifting employees back and forth. Erie-Lackawanna feels that this aspect of the matter is so *de minimis* that, as hereinafter stated, it will compensate any employee who is required to move more than once, if such an employee can be found.

Appellants do not renew in their brief the claim advanced in their applications to this Court for a stay that the New Orleans Conditions are also deficient with respect to hospitalization benefits. However consistent with the position taken in opposing the stay, Erie-Lackawanna will also make suitable provisions in that regard.

Therefore, in order to eliminate any claim of inadequacy of the New Orleans Conditions, if this Court affirms the order below, Erie-Lackawanna agrees to the entry of an order by the Commission in accordance with the jurisdiction retained by it (R. 32) which shall provide in substance as follows:

(a) If any employee is required to move his place of residence more than once as a result of the merger, Erie-Lackawanna will pay the benefits with respect to any such move, just as in the case of the first move as provided under the New Orleans Conditions; and

(b) In addition to benefits due under Paragraph 6 of the Oklahoma Conditions, incorporated in the New Orleans Conditions (R. 157), Erie-Lackawanna will pay to each employee furloughed by reason of the merger who at that time is covered by company maintained hospital insurance an amount equal to the monthly premium cost to such covered employee* of maintaining his benefits under the comparable Travelers Insurance Company Policy GA-23111 which has been in operation for some time for the benefit of furloughed employees.

These undertakings by Erie-Lackawanna are made, not in a spirit of bargaining or in any sense of conceding that the New Orleans Conditions as imposed by the Commission are inadequate, but for the purpose of eliminating any possible objection to the adequacy of the New Orleans Conditions. Exact dollar equivalency may never be achieved—for instance, a furloughed employee may be financially better off under the New Orleans Conditions in that he is no longer paying union dues, buying work clothes or incurring transportation costs to and from work—but, as we read the requirements of the second sentence of § 5(2)(f), the compensatory conditions should approximate as closely as possible the value of the employment. There can be no question of that here, in the light of the above undertakings.

*"Covered employees" are non-operating employees who receive hospitalization insurance. Operating employees elected to receive an increase in pay in lieu thereof and such affected employees would, of course, have that increase reflected in salary payments under the New Orleans Conditions.

7. The court below did not err in referring to labor publications or in its handling of testimony taken at the hearing on the temporary restraining order.

Appellants charge that the court below erred in refusing to receive the testimony given by Mr. Crotty (Br. 4, 85-86) at the hearing before Judge Thornton on the temporary restraining order deserves short shrift. Counsel for appellants advised the court below that such testimony added nothing to the merits of his contention as to the meaning of § 5(2)(f) (R. 176). Also, the blunt fact is that the court below did not refuse to accept the testimony but left the matter undecided, and appellants took no exception to that action (R. 176-180).

Likewise specious is appellants' assertion (4, 82-83, 85) that the court below should not have referred to the labor publications listed in footnote 3 of its opinion (R. 201). Those publications were listed and quoted from in the joint brief below of the United States and the Commission as examples of the contemporaneous construction which railway labor put upon § 5(2)(f) in 1940 as requiring only compensatory benefits, and were again presented at the argument. Appellants raised no objection, and indeed, no basis for objection exists. For certainly it is relevant, in arriving at the meaning of a statute, to know what the persons most directly affected by the statute contemporaneously explained that it meant. Judges are not required to decide cases in uninformed isolation, sheltered from the teachings of practical life. As this Court has indicated on many occasions, courts may inform themselves on matters deemed relevant from appropriate sources. See, *e.g.*, *Brown v. Board of Education*, 347 U. S. 483 at 494, n. 11; see also *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, at 485, n. 7 (dissenting opinion of Mr. Justice Jackson). There is nothing to the contrary in *United States v. United*

Mine Workers of America, 330 U. S. 258 at 281-282, which appellants cite for their contention. That case is wholly inapposite, for at the place cited this Court simply stated why the remarks of certain Senators in a debate in 1943 could not serve to change the legislative intent of Congress expressed in 1932 in connection with enactment of the Norris-La Guardia Act.

CONCLUSION

For the reasons stated, the judgment below should be affirmed and the stay renewed by this Court in its order of February 20, 1961 (R. 211) should be dissolved.

Respectfully submitted,

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March 23, 1961

APPENDIX

1a

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

AFFIDAVIT OF GARRET C. WHITE

DISTRICT OF COLUMBIA) SS:

GARRET C. WHITE, being duly sworn, deposes and says:

1. I am the Vice President-Operations of the Erie-Lackawanna Railroad Company (the Erie-Lackawanna) and I have personal knowledge of the facts stated below.

2. Beginning October 13, 1956, the Erie and the Lackawanna effected a coordination of facilities at Hoboken, New Jersey. In this coordination, the New Orleans Conditions

were agreed to by the Railway Labor Executives' Association (RLEA) and imposed by the Interstate Commerce Commission and 273 adversely affected employees drew benefits thereunder for varying periods of time. Four years later, in October 1960, benefits were still being paid to 16 employees adversely affected by this coordination because attrition had not made comparable jobs available. The Hoboken Coordination primarily affected a large proportion of employees in three general classifications—Marine Department, Station Service and Towermen-Operators—and, after four years, attrition had not resulted in comparable jobs for all employees in any of these three categories, for of the 16 employees still drawing benefits in October 1960, 5 were from the Marine Department, 7 from Station Service and 4 were Towermen-Operators.

3. Due to the organization of the railway labor force by crafts, attrition projections covering the entire labor force offer little guidance in planning changes in personnel and estimating how attrition will ease the impact of reductions in and relocations of the labor force. A craft by craft study is preferable. I have just completed a study of how attrition is expected to operate over a four-year period upon one of the many crafts involved in the Erie-Lackawanna merger, namely, line clerks, a category which includes all clerks except general office and traffic department clerks.

4. The Erie-Lackawanna plans to eliminate duplicate and unnecessary facilities in the merger area (which is that area Buffalo and East served before the merger by both the Erie and the Lackawanna) and this plan, based upon actual job studies, will eliminate the need for 128 line clerks, approximately 10% of the line clerks in the merger area; of the 128 positions to be abolished, our plans contemplate the elimination of 32 in the first year in which the Erie-Lacka-

wanna is free to proceed with the merger; 64 in the second year and 32 in the third year.

5. Based upon actual attrition among the line clerks in the merger area for 1959 (which I believe to be the most recent normal year), and assuming that attrition will continue at the same rate, 26 jobs will become available annually in the merger area by virtue of attrition. Attrition among line clerks in the area west of Buffalo cannot be assumed to create openings available to surplus employees in the merger area for the reason that the collective bargaining representatives of the line clerks have clearly indicated that such job openings must first be filled from the seniority rosters in the area west of Buffalo and this preference, plus the state of the seniority rosters west of Buffalo, precludes any expectation that surplus line clerks from the merger area can be absorbed elsewhere.

6. Personal experience with the operation of attrition in the Hoboken Coordination and in other similar situations (such as the Binghamton-Gibson Coordination in 1959) makes it clear that a position opened by attrition is often not filled by an employee whose job has been abolished by a coordination. Such employee often does not have the qualifications for the position opened. Such personal experience further indicates that a position opened by attrition is often not filled by an adversely affected employee who is qualified for such position because the employee does not wish to move for reasons such as age, family ties and responsibilities, or an unwillingness to accept the new responsibility. Accordingly, of the 26 jobs becoming available annually by virtue of attrition a most favorable estimate is that 80%, or 21 jobs, would actually be filled by people affected by the merger. Indeed this is believed to be a high estimate because it assumes that collective bargaining

agreements covering the line clerks will be changed to permit these jobs to be filled by people from different seniority rosters within the merger area although the fact is that, at present, representatives of the line clerks have stated that they will not agree to such mobility throughout that area, but will only agree to mobility within seniority divisions planned for the merger area.

7. Assuming that 21 affected employees can and will fill jobs opened by attrition, we would have the following results if it were determined that an employment freeze is required:

	<u>1st year</u>	<u>2nd year</u>	<u>3rd year</u>	<u>4th year</u>
Number of jobs abolished	32	64	32	0
Number of employees absorbed by attrition	21	21	21	21
Surplus employees (Cumulative total for each year)	11	54	65	44

8. While the foregoing table is an estimate, it is believed realistic and supported by experience. Further the assumptions used were most favorable to RLEA's position; for example, it is assumed in that table that the Erie-Lackawanna labor force will remain stable in total numbers, whereas the trend for the past five years has been sharply downward.

9. Both management and labor have a mutual interest in having attrition operate so that men may maintain their employment and perform needed services for their pay rather than receive equal compensation when no work is available, but my best information provides no basis for the

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assumption that attrition will be more than a partial solution over the four-year period involved.

/s/ GARRET C. WHITE
Garret C. White

Subscribed and sworn to before me this 22nd day of March, 1961.

/s/ LOUISE NORRIS
Notary Public, D. C.

[SEAL]

My Commission Expires Dec. 14, 1965.

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JAMES R. BROWNING, Clerk

No. 681

In the Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
ET AL., APPELLANTS**

v.

UNITED STATES OF AMERICA, ET AL.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN**

**BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE
COMMISSION**

OPINION BELOW

The opinion of the three-judge district court (R. 196-203) is reported at 189 F. Supp. 942. The report of the Interstate Commerce Commission (R. 10-28) is published at 312 I.C.C. 185.

JURISDICTION

The final judgment and order of the district court was entered on December 19, 1960 (R. 204). Notice of appeal was filed on January 9, 1961 (R. 205). This Court noted probable jurisdiction and granted a motion to advance the case on February 20, 1961 (R. 211).

Jurisdiction of this Court to review the final judgment and order of the district court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 5(2)(f) of the Interstate Commerce Act requires that the Commission, as a condition of its approval of a rail consolidation or merger, order the carriers to maintain employees in their existing or in comparable jobs for a four-year period (as appellants' contend); or the Section is satisfied (as the government contends) by provision for compensatory benefits during the protective period.

STATUTE INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f), provides:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in

the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

STATEMENT

This is a direct appeal from a final judgment of a three-judge District Court for the Eastern District of Michigan (Southern Division) dismissing a complaint of the Brotherhood of Maintenance of Way Employees ("Brotherhood") and the intervenor Railway Labor Executives' Association ("RELA") which sought to set aside an order of the Interstate Commerce Commission. The Commission's order approved a merger of the Delaware, Lackawanna & Western Railroad Company into the Erie Railroad Company, with the surviving railroad to be known as Erie-Lackawanna Railroad Company. The complaint attacked only that portion of the Commission's report and order which related to the protection of employees.

The administrative proceedings: On July 1, 1959, Erie and Lackawanna filed a joint application for the Commission's approval of a proposed merger pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)). The application stated that "The applicants consent to the entry of an order by the Commission for the protection of employees in conformity with the order in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952)" (at 37).

The so-called "New Orleans" conditions provide financial compensation or payments to employees, as follows:

(1) A displaced employee, *i.e.*, an employee who "is placed in a worse position with respect to his compensation and rules governing his work conditions" (R. 155), receives "a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced" (R. 155-156), for a period of four years from the effective date of the Commission's order of approval.

(2) A dismissed employee, *i.e.*, an employee who loses his job, receives a monthly dismissal allowance equivalent to his average compensation during the last 12 months of his employment, less his earnings in other employment and benefits under any unemployment insurance law, for a period of four years from the effective date of the Commission's order of approval (R. 156-157).

3. A dismissed employee may elect to resign and to accept a lump sum separation allowance determined in accordance with a schedule providing for 3 months' pay for 1 year of service ranging upward to 12 months' pay for 15 years of service.

(4) A transferred employee receives comprehensive reimbursement of moving costs and any loss on sale of home, "provided, however, that changes in place of residence, subsequent to the initial change caused by the transaction, which result from the

exercise by the employee of his seniority rights shall not be considered as within the foregoing provision"¹ (R. 157-158).

(4) No employee affected by the transaction approved may be deprived, during the protective period, of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera (R. 157).

It was further provided (R. 153-154), that any employee who should receive total dismissal or displacement compensation less than he would receive under the Washington Job Protection Agreement of 1936, should continue, following the expiration of the four-year period, to receive compensatory payments under the terms of that agreement until he received the total compensatory benefits provided by the agreement. The purpose of this provision was to provide added compensatory protection for an employee who is dismissed or displaced toward the end of the four-year period. For example,² under the Washington Agreement an employee with 15 or more years of service, and whose average monthly compensation has been \$400, is entitled to a monthly allowance of 60% of \$400 for a period of 60 months, or a total of \$14,400 (R. 143-144). Without this provision, such an employee who was dismissed 12 months before the end of the four-year period would receive \$400.

¹ There is a corresponding limitation in the Washington Job Protection Agreement (R. 149).

² In this example, no adjustment is made for possible earnings in other employment.

per month for only 12 months, a total of \$4,800. The effect of this provision is that, following such 12 months, he will continue to receive \$240 per month until he has received dismissal compensation totalling \$14,400, i.e., for 40 additional months.³

A hearing examiner conducted extensive hearings upon the foregoing application in which interested persons and groups, including appellant RLEA, participated as parties. The applicant railroads introduced evidence as to the cost of compliance with the "New Orleans" conditions for the protection of employees. RLEA introduced no evidence at these hearings. After the evidentiary record was closed, RLEA, in its brief filed with the hearing examiner, claimed (R. 170) that Section 5(2)(f), makes it mandatory upon the Commission, in approving any transaction under Section 5, to impose conditions requiring that no employees shall be

deprived of employment or placed in a worse position with respect to their employment or compensation due therefor for a period of four years from this Commission's order of approval herein, because of the merger of the said railroads or any program of economies undertaken as a result thereof [R. 189].

This marked the first occasion, in this or any other proceeding, that RLEA contended that Section

³ These protective conditions are unique. A recent study by the Department of Labor indicates that as of 1955-56 the average dismissal pay received after 25 years of service in industry generally (i.e., excluding railroads and airlines) is 30.7 weeks pay. *Collective Bargaining Clauses: Dismissal Pay*, Bulletin No. 1216, U.S. Department of Labor (1957) p. 9.

5(2)(f), enacted in 1940, could not be satisfied by protection in the form of monetary compensation.

In his findings (which were adopted by the entire Commission as its own with some supplementation (R. 12)), the Hearing Examiner found that, "In recent years the operations of [Erie and Lackawanna] produced income less than sufficient to satisfy their annual fixed charges and contingent interest payments and resulted in both railroads being financially weak despite continued efforts to reduce avoidable operating costs individually, and to coordinate certain separate operations to the financial benefit of both" (312 L.C.C. at 244). Analyzing the applicants' estimate that the merger would result in increasing their combined income available for fixed and contingent charges before Federal income taxes by \$13,542,038 (*id.* at 213), the Hearing Examiner concluded that, "The savings which the merger would permit, even if only partly realized within the first 5 years after the merger is consummated, warrants approval of the transaction * * * (*id.* at 248). He pointed out that (*id.* at 247):

* * * Among the contributing advantages which justify the approval of the merger and the proposed related authorizations are the resulting general improvement in providing transportation service under conditions permitting more efficient use of motive power and equipment; elimination of duplicative facilities and

* This refers to the joint use of terminals and trackage authorized by the Commission in *Erie R. Co. Trackage Rights*, 295 I.C.C. 303, and *Delaware L. & W. R. Co. Trackage Rights*, 295 I.C.C. 743.

savings in traffic and general expenses; consolidation of freight and passenger terminal facilities; consolidation and modernization of yards, and locomotive and car shops; and reductions in the combined costs of traffic, accounting and other departments. The greater financial stability of the unified company would permit operational improvements requiring larger expenditures than either applicant would be able to finance under present conditions, and the availability of sites for industrial development where facilities which would be abandoned are situated would tend to generate traffic presently not moving over the lines of the applicants.

The only evidence as to the effect of the proposed merger upon the employees consisted of studies and estimates introduced by the applicants. These indicated that the merged railroad would start with 27,689 employees, and that over a five year period 1,982 jobs would be abolished, 2,159 jobs would be transferred and 11,186 jobs would be created by attrition. The cost to the merged railroad of compliance with the New Orleans protective conditions for employees was estimated at \$3,108,000 without adjustment for income taxes (*id.* at 233-234).

The Hearing Examiner recommended that the proposed merger be approved subject, *inter alia*, to the "New Orleans" conditions for the protection of employees.

Upon exceptions to the Hearing Examiner's report, and following oral argument, the entire Commission approved the merger as consistent with the public interest and, in a detailed discussion, affirmed the Hearing Examiner's conclusion that the requirements

of Section 5(2)(f) would be fully satisfied by the compensatory protection of the New Orleans conditions.⁵

The proceedings in the lower court: The present action was instituted on October 7, 1960, in the District Court for the Eastern District of Michigan (R. 1-9), by the Brotherhood of Maintenance of Way Employees, RLEA, and Erie and Lackawanna, intervened as plaintiff and defendants, respectively.

On October 12, 1960, a hearing was held before District Judge Thornton on the appellants' application for a temporary restraining order. During this hearing, Judge Thornton received the testimony of Harold J. Crotty (R. 42) and various exhibits (Plaintiff's Exhibits 1 through 7, R. 84-159) on the issue of whether a temporary restraining order should issue to protect the appellants from irreparable damage within the meaning of 28 U.S.C. 2284(3).

On October 14, Judge Thornton entered a temporary restraining order broadly preserving the status of all employees in their existing jobs and enjoining transfers (R. 161-162).

⁵ Addressing itself to appellants' job-freeze contention, the Commission also stated (R. 26):

* * * Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs, would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers.

* * *

In a stipulation dated November 4, 1960 (R. 169-171), all of the parties agreed as to "the sole issue to be litigated in this action, namely, the interpretation of the mandatory requirements of Section 5(2)(f)."

On November 15, 1960, the three-judge court heard oral argument on the merits. At the beginning of the argument, the appellants asked the court to receive and consider on the merits of the case, as "amplifying" the record made before the Commission, the testimony and exhibits received by Judge Thornton on the application for a temporary restraining order. The three-judge court ruled that if it later decided that it should consider that evidence, it would give the defendants an opportunity to present evidence (R. 172-180). The court never did consider the evidence.

On December 7, 1960, the three-judge court rendered its unanimous opinion (R. 196-203) sustaining the Commission's order and its construction of Section 5(2)(f). On December 19, the court entered its judgment (R. 204) dismissing the complaint and vacating the temporary restraining order.

This Court's order of February 20, 1961, noting probable jurisdiction (R. 211) granted the appellants' application for a stay of the judgment insofar as it vacated the temporary restraining order previously issued by Judge Thornton, and has the effect of reinstating that order.*

* The appellants' notice of appeal designated as a part of the record to be transmitted to this Court items 7 and 8, consisting of the Crotty testimony and exhibits received by Judge Thornton on the application for a temporary restraining order—material which the three-judge court refused to consider on the merits. On January 23, 1961, Judge Thornton denied the motion of the United States and the Commission to strike

SUMMARY OF ARGUMENT

The first sentence of Section 5(2)(f) requires the Commission to impose, as a condition of its approval of a merger or consolidation, a "fair and equitable arrangement" for the protection of affected employees. The second sentence (upon which appellants ground their case) requires the establishment of minimum safeguards during a four-year period following the date of the Commission's order of approval—specifically, that the Commission shall impose "terms and conditions" to the end that the "transaction will not result in employees * * * affected by such order being in a worse position with respect to their employment". The third sentence, or proviso, preserves to employees the right to protect their interests by collective bargaining.

In our view, the second sentence, with its provision for the protection of "affected" employees, requires that those who are economically injured in consequence of a Section 5 transaction receive a full measure of compensatory benefits for the statutory period. This means, in addition to compensation for lost wages, compensation for the other incidents of employment, such as costs of transfer, hospitalization, free transportation, and the like.

Appellants contend, however, that they must be maintained in their present employment for the statutory period. The palpable weakness of this contention is that the statute does not in terms say that these items from the record to be certified to this Court (R. 210). We believe that this material, which was not presented to the Commission, is not properly before this Court.

employees may not be discharged, although such a thought is certainly not difficult to express. Moreover, if all employees must be maintained in their existing employment following approval of a merger, it is difficult to understand the reference to employees "affected" by the merger.

A further weakness is that Congress considered the job-freeze approach—one which it had previously adopted in the Emergency Railroad Transportation Act of 1933. During consideration of the legislation which became Section 5(2)(f), Congressman Harrington offered an amendment which would have prohibited Commission approval if the proposed transaction would result "in unemployment or displacement of employees of the carrier or carriers * * *." The Harrington Amendment, however, was rejected. A substitute proposal thereupon replaced the specific language of job freeze with the language which is now before the Court—no "worse position with respect to their employment." To be sure, the proponents of the original Harrington Amendment vigorously supported the substitute; but their choice, at that point, was to do so or to fail completely in their efforts to hedge the Commission's discretion with a requirement that it provide minimum safeguards. The crucial fact is that the language was significantly changed, as the members of Congress were well aware. Moreover, the conference committee report which approved the substitute stated that "benefits to employees will be required to be paid." In similar vein, several conferees (including the House chairman) participating in the ensuing debate indicated that the statute called for

the payment of benefits to those who were displaced. We do not say that the substitute language was defined with precision during the course of the legislative proceedings. We do urge, however, that a marked change was deliberately made after the original Harrington Amendment was defeated and that appellants cannot point to any persuasive history which would justify the Court in reading into the final text the very requirement which Congress omitted.

Far from aiding appellants, the opinions of this Court show that the Court has assumed, either implicitly or explicitly, that Section 5(2)(f) calls for the payment of compensatory benefits. In the most recent case involving the section (*Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330), four Justices, in dealing with the question whether a request for absolute job protection was a proper subject of collective bargaining as between a railroad and its employees, stated that the Commission would be without power to order a job freeze (*id.* at 357 (dissenting opinion)). Yet, appellants here are contending that the Commission can order nothing short of a job freeze. No member of this Court has ever subscribed to appellant's view.

Examination of twenty years of administrative history shows that the Commission has proceeded, from the beginning and without exception, upon the premise that the statute is satisfied by compensatory benefits. Over the years, the Commission, with the active participation of the railroad brotherhoods, has evolved various types of conditions deemed appropri-

ate to the statutory objective, all cast in terms of monetary compensation, including the comprehensive "New Orleans" conditions imposed in this case. Not the least suggestive feature of this long history of consistent administrative practice is that, until the instant case, the representatives of railway labor have openly agreed with the Commission's premise and have sought "terms and conditions" providing financial benefits.

We emphasize finally that there is no occasion for this Court to consider whether in the particular circumstances of this transaction the "New Orleans" conditions will provide full financial protection. No challenge on this point was raised before the Commission and no evidence on the subject was offered. In the district court, moreover, appellants stipulated that "the sole issue to be litigated" was "the interpretation of the mandatory requirements of Section 5(2)(f)." If appellants, as their brief to this Court suggests, desire to raise the question whether the "New Orleans" conditions provide adequate compensatory benefits, they must present their contentions and their evidence, in the first instance, to the Commission. The opportunity is still open, for the Commission has full power to entertain supplemental proceedings and to issue further orders.

ARGUMENT

I

THE LANGUAGE OF SECTION 5(2)(f) DOES NOT COMPEL THE COMMISSION TO APPROVE RAILROAD CONSOLIDATIONS ONLY ON CONDITION THAT ALL EMPLOYEES SHALL BE MAINTAINED IN ACTIVE JOB STATUS

Section 5(2)(f) provides a rounded and well-balanced method for protecting employees affected by a railroad merger.

The first sentence declares that the Commission, as a condition of approving a merger or consolidation, "shall require a fair and equitable arrangement to protect the interest of the railroad employees affected." Obviously, this constitutes a broad grant of discretion to the Commission to do what it deems necessary in the particular circumstances to aid those who are "affected" and hence faced with losses. As this Court has held, this sentence is a flexible provision which permits the Commission to go beyond the minimum required by the succeeding sentence. See *Railway Labor Executives' Association v. United States*, 339 U.S. 142, discussed *infra*, pp. 43-47, holding that it authorizes the Commission to provide protection for a period extending more than four years from the effective date of its order approving a merger.

The second sentence requires the Commission to prescribe "terms and conditions" insuring that the transaction "will not result in employees * * * being in a worse position with respect to their employment" for a four-year period following the date of its order. This sentence establishes a floor below

which the Commission may not go. Protection must be provided for at least four years. As to the *kind* of protection which is required, we believe that it imposes upon the Commission the duty to assure the employee entirely adequate compensation for the various incidents of employment which may be lost or impaired as a result of the merger.⁷ Unlike appellants, however, we do not read the sentence to mean that employees must be maintained in their jobs.

The third sentence of the section completes the scheme. It provides simply that nothing in the first two sentences shall inhibit employees from undertaking to protect their interests by entering into voluntary agreements with the carrier or carriers.

The district court held (R. 199-200), as a matter of statutory construction, that the "plain language" of Section 5(2)(f) of the Act precludes a reading "that continued employment of affected employees is required to be imposed" before the Commission may approve a railroad consolidation. It concluded that the use of the phrase "in a worse position with respect to their employment," instead of language "clearly stating that the railroads may not discharge affected employees," showed that Congress did not propose to require the imposition of "any specific condition, much less that of guaranteed employment" (R. 199), and that an "approach giving effect to each phrase [in the section] necessitates

⁷ As to the variety of incidents which may be involved in loss of employment, see the discussion of the "New Orleans" conditions, *supra*, pp. 4-5, and the different types of benefits provided for in the Washington Job Protection Agreement of 1936 (R. 139-151).

denying the construction contended for by plaintiffs" (R. 290). We think the lower court's construction of the language of the section is both natural and correct. At the very least, appellants have a very heavy burden when they claim that the general language in which the second sentence of the section is couched has a single specific and inflexible meaning: that an absolute job freeze must be imposed in every case in which the Commission approves a merger.

The most obvious feature of Section 5(2)(f) is that it does not say in words that all employees shall be retained in their employment. Instead, it talks of "terms and conditions" which the Commission shall impose to insure that affected employees will not be placed "in a worse position with respect to their employment." The generality of this language takes on particular significance in the context in which it was adopted. As we shall show more fully under Point II, *infra*, before, during, and after the time when this language was adopted, Congress knew how to draft language which would require absolute job protection. Thus, in the Emergency Railroad Transportation Act of 1933 (48 Stat. 211, 214, Section 7(b)), Congress expressly provided that "the number of [railroad] employees in the service of a carrier shall not be reduced" in any one year more than by 5%, "nor shall any employee in such service be deprived of employment * * *". And in the Harrington Amendment to Section 5(2)(f) as originally proposed by the House Committee (for which the present language is a substitute; see pp. 29, 32-33, *infra*), it was stated with equal clarity that no transaction

should be approved by the Commission "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees" (84 Cong. Rec. 9882). And only three years later, in an amendment to the Communications Act permitting the merger of two domestic telegraph companies (57 Stat. 5), it was provided (a) that each employee of a merging carrier "shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years" (47 U.S.C. 222(f)(1)) and (b) that no such employee "shall, without his consent, have his compensation reduced, or * * * be discharged or furloughed during the four-year period" (47 U.S.C. 222(f)(7)).*

*The legislative history of the 1943 amendment to the Communications Act reveals that Congress was aware that, in requiring a job freeze, it was going further than it had only three years before in providing in Section 5(2)(f) for the protection of railroad employees affected by a merger. Thus, Senator McFarland, co-sponsor of the 1943 amendment, stated (88 Cong. Rec. 3415):

* * * We have, therefore, gone further in this bill to protect the man who has become trained in the telegraph profession from losing his position and seniority than any legislation ever enacted by Congress.

The clear distinction between the employee protection for telegraph operators under Section 222(f) and that provided in Section 5(2)(f) was clearly brought out in a discussion between Senator Aiken (an opponent of the bill) and Senator White (a proponent) during the Senate consideration of the conference committee report (89 Cong. Rec. 1195-1196):

Mr. AIKEN. Does what the Senator said mean that the measure would establish a precedent for labor in matters like the one dealt with by it?

Mr. WHITE. There is no other situation like it. In the

But the discrepancy between the language adopted here and that chosen by Congress in situations where it clearly wished to impose a "job freeze" is not the only difficulty with appellants' construction of the section. The essence of appellant's position is that no employee of a consolidated railroad system should be adversely affected in any respect for a period of four years (or such lesser time as the employee had been employed by one of the merging railroads) from the effective date of the Commission's order. Thus,

pending measure we guarantee that, after the merger, labor employed before March 1941 shall continue to have employment for a period at least equal in time to the period during which it was employed by the constituent companies before the merger, with a maximum of 4 years' time. In my view there is no comparable situation. Something has been said about what have done for railroad labor, and the question is asked why we should do more for the telegraph employees than has been done for railroad employees. I think there is a very basic difference which furnishes a convincing reason for the greater liberality on our part for the telegraph company labor. When a railroad line is abandoned or when its services are curtailed employees affected can go to a hundred other railroads in the country seeking employment. When a corresponding change occurs with reference to a telegraph company, when the Postal Telegraph Co. disappears, there is just one place where the man who has given his life's services to the telegraph industry can go for employment, and that is to the merged company which it is proposed to set up. [Emphasis added.]

Appellants cite a statement (Br. 69-70) during the debates on the 1943 Act by Senator Hawks, an opponent of the bill and its labor provisions. But this statement does not indicate that he believed that the proposed Communications Act amendment went no further than Section 5(2)(f) of the Interstate Commerce Act but only that, in his opinion it "should not" do so.

it alleges that one of the deficiencies of the "New Orleans" conditions imposed here is that "[t]he 'conditions' are automatically inoperative until *after* the occurrence" of the events adversely affecting the employee (Br. 21). But Section 5(2)(f) does not say that no railroad employee shall be adversely affected by a merger during the statutory period. Rather, it undertakes to provide protective conditions or benefits for those who are in fact adversely affected. Thus, the first sentence provides that "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees *affected*" (emphasis added). Similarly the second sentence (upon which appellants rely) requires the imposition of "terms and conditions providing that during the [protective] period * * * such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment" (emphasis added).*

Appellants' only explanation for the use of the general language "worse position with respect to their employment," as a substitute for the specific job protection language of the 1933 Emergency Act and the original version of the Harrington Amendment, is a

* The Commission has consistently construed Section 5(2)(f) to mean that only those employees who are or will be adversely affected by the Section 5 transaction are entitled to protection. If there is no showing of adverse effect, the Commission has, until recently, imposed no conditions or it has reserved jurisdiction either expressly or by imposing the "North Western" conditions, which simply restated the requirements of Section 5(2)(f). See the cases listed in the Appendix, *passim*, and compare the notation in the last column. See, also, the discussion of administrative practice, *infra*, pp. 63-66.

suggestion (Br. 35-36) that the phrase served as a convenient method of combining the two separate thoughts embodied in Section 7(b) of the Emergency Act, *i.e.*, the prohibitions against any employee being "deprived of employment" or being placed in a "worse position with respect to his compensation for such employment." The difficulty with this argument (aside from the fact that it has no support in the legislative history, see pp. 32-41, *infra*) is that there was no reason for such a combination and every reason why it should not be attempted. There was no ambiguity about either the Emergency Act or the Harrington Amendment, each of which required both job protection and protection against any reduction in wage compensation. A primary objective of the sponsors of the second sentence of Section 5(2)(f) was to prescribe minimum safeguards for the employees affected, thereby narrowing the discretionary authority given the Commission by the first sentence, which, they feared, might not be liberally exercised (see pp. 34-35, *infra*). In these circumstances, it would have been pointless to attempt any unnecessary "combination" of the two clear and specific terms into one general phrase with no previously recognized meaning. And that this would have been done without clearly defining the new term is scarcely credible.

On the other hand, it seems quite clear that just such a phrase as appears in the second sentence of Section 5(2)(f) might have been drafted by a person wishing (a) to insure that the Commission would be under an obligation to provide adequate protection

to affected employees and (b) to reserve for the Commission the discretion to determine the exact terms and conditions by which such protection might best be provided in the particular circumstances. In other words, this is the type of "compromise" provision which might have been drafted to resolve differences of opinion between groups wishing, on the one hand, to leave the matter of employee protection to the broad discretion of the Commission and those aiming, on the other hand, at an absolute job freeze. The legislative history, to which we now turn, confirms that view. Clouded though some of that history may be, the one firm conclusion which does emerge is that the language finally chosen represented a compromise of conflicting views. Appellants are thus arguing that the statutory language—which does not in terms support their case—is to be read as if the proponents of "job freeze" had obtained the language which they originally sought but were in fact unable to enact.

II

THE HISTORY OF SECTION 5(2)(f) SHOWS A FAILURE BY PROPONENTS OF "JOB FREEZE" TO SECURE LANGUAGE WHICH WOULD HAVE COMPELLED THAT RESULT AND THE ACCEPTANCE BY CONGRESS OF A COMPROMISE FORMULA WHICH, THOUGH IT ENLARGED EMPLOYEES' RIGHTS TO PROTECTIVE BENEFITS, DID NOT GUARANTEE CONTINUED EMPLOYMENT BY THE NEW CARRIER

A. Historical Background of Section 5(2)(f):

Prior to 1920, railroad mergers and consolidations were left to managerial discretion—subject only to

the antitrust laws (see, e.g., *Northern Securities Co. v. United States*, 193 U.S. 197); the Interstate Commerce Act was concerned primarily with the elimination of discriminatory and unreasonable rail rates and practices.

Following the near collapse of railroad transportation in World War I and a period of government operation, Congress began to look to railroad mergers under federal regulation as one important means of assuring an efficient and healthy national railroad system. In the Transportation Act of 1920, 41 Stat. 456, 494-497, Congress, for the first time, authorized the Interstate Commerce Commission to regulate railroad security issues and to control extensions and abandonments of carriers' lines. The 1920 Act also directed the Commission to prepare a plan for the consolidation of the railroads of the country into a limited number of systems. Although the Commission was not authorized to compel consolidations it was given power to require that voluntary consolidations, submitted to it for approval should conform to the plan. (Section 407, 41 Stat. 481.) The Commission issued a tentative (63 I.C.C. 455) and a final plan (159 I.C.C. 522), but the program proved a failure, and the Commission and Congress ultimately concluded that a new approach was necessary.

During the intervening years, the depression of the 1930s put about one-third of our railroad mileage (including Erie's) into bankruptcy or receivership. The ensuing reorganizations wiped out many millions of dollars in stock and junior creditor interests. See H. Doc. No. 583, 75th Cong., 3d Sess., pp. 33, 48.

Thus, twice in the twenty years preceding 1940, the railroad segment of the national transportation system has been in serious financial difficulty.

The first provision for the protection of employees of merged railroads appeared in the Emergency Railroad Transportation Act of 1933, 48 Stat. 211. That Act established a "Federal Coordinator of Transportation," to be chosen from among the members of the Commission, who was enjoined to promote or require action to remove unnecessary duplications of services and facilities and to promote financial reorganization of carriers. Section 7(b) of the Act, 48 Stat. 214, required that the "number of employees in the service of a carrier shall not be reduced" as a result of any action under the Act. It provided further:

[N]or shall any employee in such service be *deprived of employment* such as he had during said month of May or be in a *worse position with respect to his compensation for such employment*, by reason of any action taken pursuant to the authority conferred by this title [emphasis added].

The Senate report accompanying the above provision explained that Section 7(b) was "intended to prevent any reduction in the number of employees now in the railroad service, or reductions in pay by the coordinator or the regional committees" (S. Rep. No. 87, 73d Cong., 1st Sess., reprinted in 77 Cong. Rec. 4251).¹⁰ The 1933 Act, in short, imposed a

¹⁰ The section, it should be noted, related to transactions ordered under the Emergency Act and did not extend to voluntary transactions submitted to the Interstate Commerce Commission for approval under Section 5.

job freeze and assured the maintenance of prevailing earnings.

The 1933 Act, as extended, expired on June 17, 1936 (49 Stat. 376).¹¹ Shortly before its expiration, the Washington Job Protection Agreement of May 1936 was negotiated (R. 139). This was a collective bargaining agreement between 85% of the railroads and 21 standard railroad labor organizations, which provided protection for employees who either lost their jobs as a result of a merger or were otherwise affected by a merger. Under the agreement, an employee deprived of employment received 60% of his average monthly compensation for varying periods of time based upon length of service with the carrier.

In April 1939, the Interstate Commerce Commission held (*Chicago, Rock Island & Gulf Railway Co. Trustees Lease*, 233 I.C.C. 21) that by virtue of its authority under Section 5(4) to approve a lease of the road

¹¹ During the period that the Act was in effect, Federal Coordinator Eastman criticized the job-freeze provision in a report to Congress (*Regulation of Railroads*, S. Doc. No. 119, 73d Cong., 2d Sess., p. 35) as follows:

* * * The restrictions upon reduction in railroad labor employment now contained in section 7 of the Emergency Act should be changed. They go beyond what is reasonable and stand in the way of improvements in operation and service which in the long run will be of advantage to railroad labor. The employees cannot with wisdom oppose progress which will stimulate the growth and development of the industry. It is right and proper, however, that where changes in methods of operation or administration are made, not because of lack of business, but for the primary purpose of performing work more efficiently, salvage of the employees should be a charge upon the savings effected, within reasonable limits. * * *

and properties of one railroad to another, it was empowered to prescribe "just and reasonable" conditions for the protection of employees. Exercising this power it imposed, without substantial change, the protective conditions of the Washington Agreement. In July 1939, a three-judge court held, in *Lowden v. United States*, 29 F. Supp. 9 (N.D. Ill.), that the Commission lacked power to impose protective conditions on behalf of employees, but in December this Court reversed, broadly sustaining the Commission's power (*United States v. Lowden*, 308 U.S. 225).

B. Proceedings Prior to the Harrington Amendment:

On September 20, 1938, the President appointed a special committee called the "Committee of Six," composed equally of representatives of railway labor and management, to submit recommendations on the general transportation situation. The Committee recommended the establishment of a new Transportation Board which, among other things, was to pass upon railway merger applications and consider "[t]he interests of the employees affected." A further recommendation was that approval of any consolidation should be made contingent upon "a fair and equitable arrangement to protect the interests of * * * employees."¹² Recommendations of the Committee of Six were incorporated in a Senate bill addressed to the subject of mergers, unifications, and consolidations

¹² Report of the Committee of Six, December 23, 1938, reprinted in Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531 and H.R. 4862, 76th Cong., 1st Sess., p. 275.

(84 Cong. Rec. 6136). In almost the exact terms of the proposal of the Committee of Six, this bill provided "that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of section 49, a fair and equitable arrangement to protect the interest of the employees affected" (S. Rep. No. 433, 76th Cong., 1st Sess., p. 29). After several months of hearings and three days of debate on the Senate floor, the bill was passed by a vote of 70-6 on May 25, 1939 (84 Cong. Rec. 6158). On July 18, 1939, the House reported its own bill, adopting the identical language of the Senate bill with respect to employee protection (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 12).

The detailed history of the hearings and debates on these provisions are discussed at length in the appellant's brief (pp. 39-44), and need not be repeated here since the government is in substantial agreement with appellants' characterization of that portion of the history. The significance of that history is that Congress was presented with a clear choice between two types of employee protection. The first type was the job-freeze protection which had been written into the Emergency Railroad Transportation Act of 1933. The other type was the compensatory protection provided by the Washington Job Protection Agreement of 1936. In selecting the "fair and equitable arrangement" formulation as the basis for employee protection, Congress, according to the general consensus of opinion (see appellants' Br., p. 41), chose "the continuation of the protection gained by the Washington agreement" (86 Cong. Rec. 5879). Congressman Wol-

verton summed it up after the whole debate in the House was completed: "We thought we were giving legislative assurance of at least a continuance of the Washington agreement * * *" (*id.* at 10189).

Congress also recognized, however, that the grant of discretionary power to the Commission would permit it to accord additional protection to employees if, in its judgment, that proved necessary. Congressman Wolverton observed "that the language used would not preclude the Commission from improving upon the terms of that [the Washington] agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future" (*ibid.*). And, during another phase of the debate, the same Congressman explained that the language of the provision "would guarantee to railroad labor * * * the possibility of gaining further rights by collective bargaining or by action of the Interstate Commerce Commission" (*id.* at 5879).

C. *The Harrington Amendment:*

Despite the apparent consensus, some members of the House objected on the ground that the provision was "uncertain, indefinite, and unsatisfactory" (84 Cong. Rec. 9886). Congressman Harrington, who had little faith in the type of protection offered by the Washington Agreement (see, *e.g.*, 86 Cong. Rec. 5869), characterized the "fair and equitable arrangement" provision as "[h]igh-sounding and rosy-tinted words which guarantee absolutely no safeguard to employees and, in short, mean practically nothing" (84 Cong. Rec. 9883). He thereupon offered a floor

amendment to the merger section, which was to be added as a proviso following the "fair and equitable arrangement" provision. This amendment provided "[t]hat no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees" (*id.* at 9882). There is no question, of course, that the object of the amendment was to place a permanent "freeze" on railroad employment. Congressman Harrington himself avowed that his "amendment protects the railroad worker against any unemployment or any impairment of employment rights as a result of consolidations" (*id.* at 9883).¹³

In addition to those who believed that a job-freeze provision was desirable, there were others who objected to the bill simply on the ground that a mandate to adopt a "fair and equitable arrangement" gave the Commission too broad a discretion. There was some concern that the Commission might even accord less protection than that provided in the Wash-

¹³ Commissioner Eastman, the chairman of the legislative committee of the Interstate Commerce Commission, commented on this object of the Harrington Amendment in a special report to Congress, dated January 29, 1940, stating (p. 67) that the amendment "by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees." It was the Commissioner's view (*ibid.*) that "[e]mployees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 between the railroad managements and labor organizations."

ington Agreement. Congressman Pace of Georgia expressed this dissatisfaction (*id.* at 9886):

I find that quite often the different Government administrative agencies interpret acts of Congress in a manner quite different from the intention of the Members of Congress, and no one can predict what construction the carriers and the Commission would give to the very broad language "a fair and equitable arrangement"; their idea of fairness and equity might be quite different from the treatment the Congress would want them to receive. That is why this amendment is necessary to give definite expression to the treatment or "arrangement" the Congress wants the employees to receive.

Thus, the Harrington Amendment represented; in one aspect, an attempt to establish minimum conditions of employee protection which would be mandatory upon the Commission to follow.

On July 24, 1939, the amendment was adopted by the House, without a roll call, by a vote of 96-68 (*id.* at 9887); on July 26, the House bill passed (*id.* at 10127); and on July 29, both the House and Senate bills were sent to conference (*id.* at 10443).

D. *The First Conference Report:*

The Senate bill contained no provision in any way comparable to the Harrington amendment. That amendment was therefore a major point in dispute at the conference committee meeting (see 86 Cong. Rec. 5878). While the bills were pending before the conference committee, word apparently reached the House that the Harrington amendment might be

dropped. Thereupon, 275 members of the House signed a petition addressed to the House conferees, requesting "that the Harrington amendment inserted in the Wheeler-Lea bill, S. 2009, by vote of the House be retained in the conference report," or, in the alternative, if the amendment were not retained, that the "amendment be reported in disagreement so that a separate vote on same may be obtained in the House" (*id.* at 5869). On April 26, 1940, the conference committee reported out S. 2009. The committee decided to leave Section 5, as then contained in the Interstate Commerce Act, unamended. The existing law as to consolidations therefore remained untouched, "and the provisions of the bill as it passed the House, intended to facilitate consolidation, [were] omitted from the legislation. * * * These omitted provisions as to consolidation included the Harrington amendment" (H. Rep. No. 2016, 76th Cong., 3d Sess., p. 61, reprinted in 86 Cong. Rec. 5854). The committee report explained "the elimination of the consolidation provision from the bill" as obviating "the necessity of guarding against the possible unemployment that might otherwise have resulted from these provisions" (*ibid.*).

The practical reason for dropping the matter was explained by Representative Wolverton on the floor as having its roots in the fact that railroad labor itself was divided "as to the effectiveness as well as desirability of the amendment" (86 Cong. Rec. 5880; see, also, *id.* at 5873). Congressman Lea explained in similar vein (*id.* at 5864) that the point was one on which labor was not united.

With the merger provision out of the proposed bill, however, the Commission retained very broad discretion to order whatever employee protection it deemed necessary—a factor, as noted above, which had generated much of the opposition to the “fair and equitable arrangement” provision. Congressman Harrington registered his strong opposition to the conference report because it “struck out the only portion of the bill which provided direct protection and benefits to railroad workers” (*id.* at 5871). What remained in force, he said, was “the present law on railroad consolidations, which gives to railroad employees only such protection as the Interstate Commerce Commission chooses to provide under its powers to approve consolidations. * * * I am unwilling to legislate on such a vital subject matter, unless we may meet the problem courageously and completely” (*ibid.*). In this context, the Wadsworth motion to recommit was made.

E. The Wadsworth Motion to Recommit:

The Wadsworth motion to recommit (86 Cong. Rec. 5886) required “[t]hat the managers on the part of the House insist on the inclusion in the report of the committee of conference the provision adopted by the House, known as the Jones amendment, * * * the provision adopted by the House, known as the Wadsworth amendment,” * * * [and] the provisions adopted by the House relating to combinations and

“The Jones and Wadsworth Amendments did not relate in any way to Section 5 matters. The former related to export rates for farm commodities; the latter provided that the Commission should permit reduced rates by the various media of transportation if the rates, as reduced, would yield a compensatory return.

consolidations of carriers * * * but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment read as follows:

(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment.

What was immediately apparent from the motion to recommit was that, although the Jones and Wadsworth Amendments were retained in their original language, the Harrington Amendment was altered so radically that there was no indication that it still embodied the job-freeze concept set forth in the original Harrington Amendment. This change did not escape notice on the House floor. Congressman Wolvert, in a colloquy with Congressman Bulwinkle, insisted that the motion to recommit did not contain

the Harrington Amendment. "It is an entirely different amendment. It seems as if the Harrington amendment proponents have made an additional suggestion" (86 Cong. Rec. 5885). Congressman Harrington himself referred to the amendment as "modified language for labor protection * * *" (*id.* at 5869). The reasons for the change were not stated. Doubtless, an important factor was that, during the proceedings of the conference committee, it had become obvious that the railroad labor representatives were divided in their estimate of the effectiveness and desirability of the Harrington Amendment (see *supra*, p. 31). Congressman Wolverton commented, "The fact that the former proponents of the Harrington amendment have now abandoned it and now ask the House to adopt another and different kind in its place, as set forth in the proposed Wadsworth motion to recommit, certainly makes clear a lack of confidence in the former amendment * * *" (86 Cong. Rec. 5880).

There was agreement that the modified amendment would not leave the Commission at large. Thus, one of Congressman Lea's chief complaints was that the amendment nullified the Commission's discretion under the "fair and equitable arrangement" provision (see *id.* at 5865, A2884). Congressman Harrington, on the other hand, praised the amendment for that very reason (*id.* at 5871): "The proposed labor clause sets up specific legislative standards for the Interstate Commerce Commission to follow, instead of permitting the Commission to exercise a free and easy discretion as to what is in the public interest."

But although there was agreement that the substitute provision would serve as a mandate to the Commission to establish minimum standards of employee protection, the debate throws little light on the exact meaning of the words, no "worse position with respect to their employment." Of course, it was hardly in the interest of the proponents of the original Harrington Amendment to deprecate the substitute. The job-freeze proposal had been killed. And the substitute proposal was assuredly better, from their standpoint, than a failure to issue any statutory directive to the Commission. Understandably, Congressman Harrington supported the motion to recommit and urged that it would be beneficial to employees. Thus, he stated (*id.* at 5871):

* * * The motion to recommit * * * will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment. * * *

The labor protective provision, which so many of us favor, is beneficial to all railway employees. * * * By the adoption of this provision in the transportation bill, the Government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers. * * *

Without the labor protection provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. With this provision, these younger men will be spared that fate, and job eliminations will come grad-

ually from the other end of the seniority list, as deaths, resignations and retirements occur. If S. 2009 will bring to the railroad industry the prosperity that its supporters contend for it, then the natural attrition will shortly have absorbed the employees that otherwise would be eliminated if this Congress does not now deal with this problem."¹⁸ * * *

Although this statement undoubtedly claims that, under the substitute proposal, jobs would not be eliminated, it is notable that Congressman Harrington made no attempt to explain the difference in language between the two amendments, perhaps because he believed that compensatory protection unlimited as to time would, from the employee's standpoint, be as good as a job freeze.

Congressman Lea, on the other hand, was apparently of the view that the language of the modified amendment did not impose a job freeze. Thus, in criticizing the proposal on the ground that it failed to include a time limit, he remarked (86 Cong. Rec. A2684 (emphasis added)):

This is a novel provision probably not heretofore written into any law in the United States. It would, by Federal law, impose on an employer the duty of indefinite if not a lifetime support of employees *for whom he no longer has a job*. It is entirely separate from retirement systems and unemployment insurance by which employees receive partial com-

¹⁸ Similar statements were made by Congressman Thomas (86 Cong. Rec. 5883-5884) and Congressman Warren (*id.* at 5867-5868).

pensation based on disability or length of service, or age.

* * * If we add to the employer's hazard a liability of assuming the support of all employees *when he ceases to have use for them*, regardless of the amount of salary paid or the length of service for the employer, we would thereby create a new and very great deterrent to labor employment.

In the same vein, he stated (*ibid.*) that, under the amendment, "the Commission must, without limit of time, require that an employee for whom the employer no longer has any need must be retained at the expense of the employer *on a working salary basis or on a compensation basis* totally equalling that which the employee received while performing useful service for the carrier" (emphasis added). Again, he stated, "There is no time limit in which an employer is to maintain those men in a *condition equal to that under which they were discharged*" (*id.* at 5865 (emphasis added)).

F. *The Second Conference Report:*

On August 7, 1940, the second conference report was submitted to both houses of Congress. The language agreed upon by the conferees with respect to the employee protection provision is now embodied in Section 5(2)(f), *supra*, pp. 2-3. The committee report explicitly stated that this provision was included in the conference substitute "[i]n lieu" of the Harrington Amendment "prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights" (H. Rep. No. 2832, 76th Cong.,

3d Sess., pp. 68-69, reprinted in 86 Cong. Rec. 10167). It further stated, in commenting on the provision, that "such transaction will not result in employees * * * affected * * * being in a worse position with respect to their employment" (*ibid.*):

* * * [T]he Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement *the benefits to employees will be required to be paid* for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation. [Emphasis added.]

Appellants characterize "the explanation of Section 5(2)(f) by the Conference Committee" as making it "clear * * * that in the minds of the conferees the second sentence of Section 5(2)(f) was intended to provide mandatory employment protection limited to four years" (Br., pp. 61-62). As for the words, "the benefits to employees will be required to be paid," which point plainly in the direction of compensation, appellants maintain that "[s]uch an interpretation does not square with the remainder of the report * * * nor with the fact that 'employment protection' was the manifest object of the House and a departure from that object by its conferees would have had to take the form of

something more definite than such a vague reference if intended to be effective" (*id.* at p. 61, fn. 62). The rest of the report, however, gives no indication that "employment protection," as appellants use that phrase, was intended; nor is there any decisive indication that the "manifest object" of the House was to impose a job freeze.

The meaning of the amendment was elaborated in the House debate. Congressman Lea, the chairman of the House Committee on Interstate and Foreign Commerce and of the House conferees and one of the House managers, presented the opening statement in the debate on the modified Harrington amendment (86 Cong. Rec. 10178 (emphasis added)). He discussed the "fair and equitable arrangement" provision and the provision containing the words "worse position with respect to their employment." His explanation of the latter was concerned primarily with the time limitation. First he pointed out that "the employees have the *protection against unemployment* for 4 years, but the Commission is not required to give them *benefits* for any longer period." He then pointed to "another limitation on the *protective benefits* afforded by the amendment. The *benefit* period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred."

The words "protection against unemployment" do not necessarily mean "job freeze." In common parlance, such protection includes unemployment compensation, sickness and accident benefits, pension rights, retirement status etc. Indeed, benefits of this description are the ones provided for in the Wash-

ington Agreement, officially entitled Washington Job Protection Agreement of 1936. On the other hand, the references to "benefits" are irreconcilable with the concept of a job freeze. That Congressman Lea was referring to compensation became even plainer in the colloquy which followed his opening statement (*ibid.*):

Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?

Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

Mr. VORYS of Ohio. This would be whether or not they were still employed?

Mr. LEA. Yes.

Mr. O'CONNOR. * * * Does "worse position" as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

Mr. LEA. I take that to be the correct interpretation of those words. * * *

Congressman Lea's position as chairman of the House conferees and one of the House managers of the bill gives his statements considerable weight. We note additionally that the speech of Congressman Wolverton (*id.* at 10189), also a conferee, quoted at length by appellants in their brief (pp. 63-66),

points in the same direction. And Congressman Hal-leck—also a conferee—pointed out (86 Cong. Rec. 10187) that he believed that the new provision proposed by the second conference committee “follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation.” He then concluded by stating that the language of the new provision “gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, write it into law.”

The House agreed to the conference report by a vote of 247-75 on August 12, 1940 (*id.* at 10193).

G. The Senate Proceeding:

On August 30, the conference report was submitted to the Senate (86 Cong. Rec. 11269), debated, with only a very limited and unrevealing discussion of the provision here in question (see, *e.g.*, *id.* at 11269-11270, 11545), and finally agreed to on September 9 by a vote of 59-15 (*id.* at 11766). Following the adoption of the conference report, Senator Wheeler, the sponsor of the 1940 Act in the Senate and one of the Senate conferees, was granted unanimous consent “to insert in the RECORD a statement giving some explanations of certain provisions which were changed” (*ibid.*). Appellants (Br., p. 67) cite an explanatory statement by Senator Wheeler (86 Cong. Rec. 11768) that “[p]resent law is also amended by inclusion of the Harrington amendment, protecting employees in

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the event of consolidations * * *," presumably to show that the Senate understood Section 5(2)(f) to include a provision which was equivalent to the original Harrington Amendment. The use of the shorthand term "Harrington Amendment" does not warrant this inference. Indeed, at other times during the Senate debate, Senator Wheeler explained that the conferees had "agreed to a compromise on the Harrington amendment" (*id.* at 11625). Moreover, at the beginning of his explanatory statement, Senator Wheeler pointed out that the conferees "again reported out the bill with substitutes for the Jones and Harrington amendments" (*id.* at 11766).

H. Conclusions from the History:

The firm conclusion to be drawn is a negative one: the legislative history does not provide a basis for saying that there was a clear-cut understanding or a consensus of views as to the exact meaning of the substitute language ultimately adopted—"worse position with respect to their employment." In part, the lack of clarity stems from the fact that much of the discussion which touches the point deals with other matters as well and does not focus upon the precise question before the Court. There is, however, a broader explanation of the indecisiveness of the history. As is not infrequently the case with a compromise proposal, there was considerable disposition to make the proposal appear reasonably satisfactory to persons holding varying views and predilections—hence, to deal with it in generalities rather than to define it with precision.

When all is said and done and the last efforts of the parties to pick inferences from the reports and debates are completed, these facts remain. The proponents of the "job freeze" concept started with a specific proposal not subject to misinterpretation—the original Harrington Amendment. Congress ended with a substitute—one which eliminated the language which would have compelled a "freeze" and employed other language which, at the least, invites the conclusion that the Commission would be authorized to protect employees by other means (full compensatory benefits). This change, though not carefully or fully explained, was certainly made deliberately. It cannot be passed off as inadvertent or inconsequential. We submit, in short, (1) that appellants have failed to demonstrate that there is a persuasive history to support their contention that this Court is free to treat the language enacted as if it represented no change from that originally proposed by the sponsors of the Harrington Amendment, and (2) that there was a deliberate, crucial change of phraseology dropping mention of a job freeze—a change which it is essential to take into account in interpreting the final text.

III

PRIOR DECISIONS OF THIS COURT DO NOT SUPPORT APPELLANTS' POSITION

Although they state that this is a case of first impression (Br. 83), appellants argue that two cases decided by this Court, *Railway Labor Executives' Association v. United States*, 339 U.S. 142, and *Order of Railroad Telegraphers v. Chicago and North*

Western R. Co., 362 U.S. 330, make clear that "this Court has specifically interpreted Section 5(2)(f) as requiring the Commission to provide, as a minimum, employment protection for all employees for a period of four years following approval of a merger?" (Br. 75). This is not a permissible interpretation of the Court's opinions. Indeed, this Court's previous opinions in Section 5(2)(f) cases (none of which, to be sure, involved the point at issue here) assumed that the only protection which the second sentence requires is protection in the form of compensation.¹⁶

In *Railway Labor Executives' Assn. v. United States*, 339 U.S. 142, the issue before the Court was the relationship between the first and second sentences of Section 5(2)(f) of the Act. The Commission had approved a consolidation of the interests of a number of railroads in connection with the construction and operation of a passenger terminal at

¹⁶ In the earlier case of *Interstate Commerce Commission v. Railway Labor Executives Assn.*, 315 U.S. 373, the Court held that the Commission had authority to require railroads to compensate employees dismissed or displaced as a result of an abandonment. Rejecting the contention that the strengthening of the provisions relating to railroad consolidations through the adoption of Section 5(2)(f), showed that Congress intended to grant the Commission greater authority in this area than in the case of abandonments, the Court stated (315 at 379): "The modifications [of Section 5 of the Act]; so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary." This language may have referred primarily to the first sentence of Section 5(2)(f), despite the footnote at this point in the decision setting out the entire text of the section. In all events, the opinion as a whole clearly assumes that compensatory relief is adequate compliance with the employee protection provisions of Section 5.

New Orleans. It was anticipated that the consolidation would result in an eventual displacement of approximately 300 railway employees (339 U.S. at 144, n 2). The order provided for compensatory protection of employees "affected by the consolidation," but the protection was to end four years after the effective date of the Commission order (p. 142). Since the terminal was not to be completed within this period, many "employees affected by the consolidation would not be *displaced* until completion of the project, and therefore would receive no *compensatory protection*" (*ibid.*; emphasis added).

The question presented was whether the Commission had authority, under the first sentence of Section 5(2)(f), to provide *compensatory protection* to employees who would be affected by consolidation after the end of the four year period, or whether the second sentence established "an inflexible standard for the fair and equitable arrangement required by the first sentence" (p. 146). The Court concluded that "the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation" (p. 155).

The Court's discussion rested upon the assumption that the issue involved in construction of Section 5(2)(f) was the scope of "compensatory protec-

tion"—specifically, whether employees promptly "displaced" "may receive compensatory protection * * * but employees displaced [later] will receive none" (p. 154). In disposing of this issue, the Court undertook the detailed discussion of the legislative history of the second sentence of Section 5(2)(f) which the appellants set out in their brief at pp. 71-72. But this discussion does not stand for the proposition that "the only change made in the Harrington Amendment * * * merely placed a time limit upon its operation and nothing more" as appellants assert (Br. 72). The fallacy in appellants' argument, as we have explained *supra*, pp. 32-41, is that there were *two* changes in the Harrington Amendment: (1) the change (at the time of the Wadsworth motion to recommit) which substituted the language "in a worse position with respect to their employment" for the language of the original Harrington Amendment precluding consolidation "if such transaction will result in unemployment or displacement of employees"; and (2) the subsequent change in this modified version of the Harrington Amendment (made at the second conference on the bill) which limited the period of time during which the Commission would be required to afford this protection to four years. It is this second amendment to the Harrington proposal with which the discussion cited by appellants is concerned since the question in the case was whether the four-year limitation related back so as to circumscribe the Commission's discretionary powers under the first sentence of the section. The first modification of the Harrington Amendment, which is the one in issue in

this case, was merely mentioned in passing as "not now material" (339 U.S. at 152). In other words the Court's *Railway Labor Executives Assn.* opinion assumed that both the first and second sentences of Section 5(2)(f) dealt with compensatory relief for employees discharged or displaced and dealt solely with the question whether such relief could be continued beyond the four-year period described in the second sentence." It is thus entirely consistent with our view of the statute.¹⁸

The same is true of *Order of Railway Telegraphers v. Chicago and North Western R. Co.*, 362 U.S. 330. The issue there was whether the Norris-LaGuardia Act, 29 U.S.C. 101, 108, withdrew federal jurisdiction

¹⁸ This was recognized by the appellant, *Railroad Labor Executives Association* which stated in its Reply to Petition for Rehearing in that case (p. 3):

The basic purpose of Section 5(2)(f) undeniably was to give railroad workers dismissed and displaced as a result of carrier consolidation and coordination transactions a measure of protection through compensatory benefits for a reasonable period during which they could economically readjust themselves.

¹⁹ Indeed, it is appellants' present contention that appears inconsistent with the rationale of the *RLEA* decision. There, this Court stated its belief that continued employment during the four years following the effective date of the Commission's order was "insubstantial protection"—merely "long notice" of ultimate displacement—and subjected such employees to discrimination because other employees dismissed early in the four-year period received "compensatory protection" for the remainder of the period (339 U.S. at 154). Under the appellants' present contention, it would seem that the discrimination was against those who received compensatory protection, while those who had "long notice" of ultimate displacement received everything which the second sentence of Section 5(2)(f) requires.

to enjoin a rail strike when the purpose of the strike was to secure a job-freeze clause in a collective bargaining agreement. This, in turn, depended upon whether the controversy between the union and the railroad constituted a "labor dispute" within the meaning of the Act. In concluding that it did, the Court referred (362 U.S. at 337) to the fact that under Section 5(2)(f):

* * * Congress * * * has expressly required that before approving such consolidations the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." It requires the Commission to do this by including "*terms and conditions*" which provide that for a term of years after a consolidation employees shall not be "in a worse position with respect to their employment" than they would otherwise have been.

Obviously, the above statement in the opinion, which is simply cast in the language of the statute, does not support appellants' interpretation. The opinion neither states nor suggests that the "terms and conditions" which the Commission is required to impose in approving consolidations or conditions amount to a job freeze. The Court was making the point that, since the Commission is required to establish terms and conditions to insure that employees shall not be in a worse position "with respect to their employment" than they would otherwise have been, the lower court erred in concluding that union efforts to negotiate about the job security of its members was an improper incursion upon "managerial preroga-

tive" (362 U.S. at 336). This is no more than a recognition of the fact that the third sentence of Section 5(2)(f)—the proviso clause—authorizes the unions and railroads to enter into agreements "pertaining to the protection of the interests of said employees." Clearly, the question whether absolute job protection is a bargainable issue is different from the question whether that is a condition which the Commission is required to impose.

The dissenting opinion, in which four Justices joined, contains an explicit rejection of appellants' position. That opinion states (362 U.S. at 355) that "[w]hile [Section 5(2)(f)] authorizes the Commission to require temporary mitigation of hardships to employees displaced by such unifications, nothing in it authorizes the Commission to freeze existing jobs."¹⁹ It is not, of course, necessary for the Commission to argue, or for this Court to decide, in the instant case, whether the Commission might go so far as to require a job freeze. The only question before the Court is whether the Commission *must* impose that type of protection. No member of the Court or of the Commission has ever subscribed to that view. And, indeed, until very recently, as we point out in the succeeding section of this brief, the claim that a job freeze was mandatory was never urged by the railroad brotherhoods in the many proceedings in which they participated before the Commission.

¹⁹ See, also, the dissenting opinion's conclusion, drawn from the legislative history of the Harrington Amendment, that Congress purposefully rejected the job-freeze concept (pp. 356-357).

IV

THE CONTEMPORANEOUS AND THE CONSISTENT ADMINISTRATIVE CONSTRUCTION OF SECTION 5(2)(f)—CONSISTENTLY SUPPORTED BY RAILWAY LABOR UNTIL THIS CASE—HAS BEEN THAT IT REQUIRES COMPENSATORY BENEFITS ONLY.

Section 5(2)(f) has been on the statute books for more than twenty years. Throughout this period, the Commission, without exception, has proceeded upon the premise that the section calls for the payment of appropriate compensatory benefits. The weight of this established and unvarying administrative practice (cf. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315; *United States v. Public Utilities Commission*, 345 U.S. 295, 314–315) is the more impressive when one adds that, during this time, until the evidentiary record before the Commission in the instant case was closed, the representatives of railway labor—on whose behalf the protective statute was passed—had invariably taken precisely the same position as the Commission.

In this portion of the brief, we discuss, *first*, the pronouncements of railway labor spokesmen made contemporaneously with the enactment of the statute. *Second*, we show that labor's representatives presented this same view to the Commission in proceeding after proceeding and that the Commission repeatedly endorsed it. *Third*, we trace the development of the principal types of conditions which the Commission has devised in order to provide a proper measure of compensatory benefits.

A. The Railroad Unions' Construction of Section 5(2)(f) Contemporaneously with its Enactment:

Following the enactment of Section 5(2)(f), appellants, as well as other unions, interpreted the provision to require compensation only, and not a job freeze. In October 1940, appellant Brotherhood of Maintenance of Way Employees advised its members, in its official organ, concerning the protective provisions in the Transportation Act of 1940 (49 *Journal* 13-14 (Oct. 1940)):

FOUR YEARS' FULL PAY

The law provides that any employe who has been in the service of a railroad four years or more, and loses his job because of a merger or "coordination", must be paid his full wages for four years. If he has been a railroad employe less than four years, he must be paid his full wages for a period as long as his previous service.

No such protection and compensation have ever been guaranteed by law to the employes of any other industry, and the railroad workers secured these unprecedented benefits through the Brotherhood of Maintenance of Way Employees, in a cooperative movement with the other Standard Railroad Labor Organizations.

That same month, Mr. J. A. Phillips, President of the Order of Railway Conductors of America (now Order of Railway Conductors and Brakemen), reported on the "President's Page" of the union's journal (57 *The Railway Conductor* (now *The Conductor and Brakeman*) 308 (Oct. 1940)) that "[s]pe-

cial features of the act include protection in the form of a dismissal wage ranging up to four years' full pay for railroad employees forced out of their jobs by mergers and co-ordinations * * *."

Similiarly, that month, the Brotherhood of Locomotive Firemen and Enginemen stated in its *Magazine* (p. 223):

During its turbulent course through the Congress, chief executives of the transportation organizations and the Order of Railroad Telegraphers put forth herculean efforts to include a provision designed to protect employes *displaced* as a result of mergers or consolidations. Finally they were successful, in face of much opposition, in securing adoption of a section which provides that [quoting the second sentence of Section 5(2)(f)]. [Emphasis added.]

In June 1941, Harold C. Heiss and Russell B. Day, Grand Lodge Counsel of the Brotherhood of Locomotive Firemen and Enginemen, discussed Section 5(2)(f) in an article in the *Magazine* (Vol. 110) entitled "Development of Labor's Legal Rights in Railroad Consolidations and Abandonments" (p. 523):

Railway labor has thus secured for itself the unqualified legal right to be compensated in large measure for the losses resulting from consolidations; which losses were formerly shouldered upon them as being one of the inevitable consequences of a public policy that favored railroad consolidations.

Mr. George M. Harrison, Chairman of the Railway Labor Executives' Association and a member of the Committee of Six, presented an exhaustive analy-

sis of the newly enacted section in another publication (39 *Railway Clerk, Official Journal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* 467, 488 (emphasis added)):

At present we see no conflict between the law and the Washington Job Protection Agreement. * * *

* * * The language "worse position with respect to his employment" is not new and its meaning is well understood. It is included and has been applied under the Job Protection Agreement for four years and was included in the Commission's order in the Rock Island case. *The language means just what it says. An employee with four or more years' service must not be worse off as to his earnings and working conditions because of the consolidation for a period of four years.*

This provision will not mean anything to employees retained in service who are covered by the Washington Job Protection Agreement because such employees are guaranteed five years protection from the date of the coordination. It will however mean quite a bit to employees who are not protected by the Washington Agreement.

Under the language of the new legislation no employee of a carrier is to be in a worse position as a result of the consolidation. He must either be kept in service without impairment of his earnings or working conditions as a re-

sult of the consolidation or he must be made completely whole by the carrier for a period of four years if he has as much as four years' service or if not, for a period equal to the length of his service.

B. The Contentions of the Railway Unions before the Commission and the Pronouncements of the Commission with respect to the Meaning of Section 5(2)(f):

On October 8, 1940, immediately following the enactment of Section 5(2)(f), the Commission was presented with the first case under Section 5(2) in which the RLEA filed a protest. The applicants in *Minneapolis & St. L. R. Co. Reorganization*, 244 I.C.C. 357 (1941), requested that the proceeding be considered under the new Section 5(2) and that the hearing be reopened. A former application to acquire properties of the bankrupt company had been denied (240 I.C.C. 57). In that proceeding, RLEA had requested the financial protection approved by this Court in the *Lowden* case (308 U.S. 225). In the reopened proceeding, RLEA argued that the new Section 5(2)(f) "affirmed the jurisdiction of the Commission" to protect employees, but that under former Section 5(4) the Commission had imposed even "more comprehensive" protection than the minimum protection required by Section 5(2)(f).²² The

²² Memorandum Brief of the Railway Labor Executives' Association filed October 15, 1940, in Finance Docket No. 12414, p. 17:

By this provision [Section 5(2)(f)] Congress has affirmed the jurisdiction of the Commission to impose conditions for the protection of employees, and has given it

Commission found, however, "that the possibility of the employees' being adversely affected by the proposed plan is remote, and therefore [we] consider it unnecessary to impose conditions for their protection at the present time" (244 I.C.C. at 377).²¹

Shortly thereafter, the issue involved here was presented to the Commission (*Fort Worth & D.C. Ry. Co. Lease*, 247 I.C.C. 119 (1941)), and the union made clear its position that there was no mandatory requirement of a job freeze. In *Fort Worth*, the lessor railroad planned a unification of operations to be

some direction in the exercise of its discretion. It appears that the Commission is required as a minimum to provide in its order "that during a period of four years from the effective date of such order" employees shall not be "in a worse position with respect to their employment" as a result thereof. In addition to this required minimum, the Commission shall further "require a fair and equitable arrangement to protect the interests of the railroad employees affected."

In other cases arising under former Section 5(4) the Commission has seen fit to impose conditions for the protection of employees which are more comprehensive than the present statutory minimum. See *Chicago, Rock Island and Gulf Railway Company Trustees' Lease*, 230 I.C.C. 181² affirmed; [*sic*] *U.S. vs. Lowden*, 308 U.S. 225, and *Louisiana and Arkansas Railway Company Merger*, 230 I.C.C. 158.

²¹ The following later appeared in the Commission's findings (244 I.C.C. at 390):

We reserve jurisdiction to make additional findings and impose such terms and conditions as may be required by the provisions of section 5(2)(f) of the act with respect to the employees involved if upon petition by them it is made to appear that the condition of their employment has been or will be adversely affected by anything done pursuant to authority herein granted under section 5(2) of the act within the 4-year period immediately subsequent to the effective date of our order herein.

effectuated over a period of years, with major changes occurring after the first four or five years. The railroad argued along lines similar to appellants' present position—that, although the second sentence of Section 5(2)(f) was uncertain, a job freeze for four years was consistent with the language and hence no compensation was required to be paid. Thus it stated in its brief to the Commission: ²²

* * * This will have the effect of deferring, until termination of the statutory protective period, the bulk of the savings made possible by the unified operation, but it is believed that it will afford a full compliance with the statute, and that, at the end of the period, applicant will be under no further obligations to the employees affected by the lease (R. 466, 467, 504, 505). * * *

RLEA and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees replied in a detailed memorandum that the second sentence was satisfied by providing a system of dismissal and displacement allowances: ²³

The applicant claims that this language is to be interpreted as requiring the maintenance of every detail of the employment relationship for

²² Applicant's Brief on Further Hearing, Finance Docket No. 12460, filed January 15, 1941, p. 50.

²³ Memorandum Brief of RLEA and the Brotherhood of Ry. and S.C., F.H., E. and S. Employees, in Finance Docket No. 12460, filed Jan. 15, 1941, pp. 17-18. Earlier in the memorandum, the unions discussed the legislative history of Section 5 (2)(f), and termed the section a product of compromise (see *id.* at pp. 12-14).

a period of 4 years. It has concluded apparently that there is no way to compensate the employee for the loss of the various incidents of "employment" and that the carrier's only recourse is to continue the employment itself in toto for a period of 4 years from the effective date of the order. This, it seems to believe, is absolutely required by the language of the statute.

With this construction we do not agree. The statute as we have noted, requires that the employee must be placed in no worse position with respect to his employment. The only way in which an employment relationship can be rendered less desirable to the employee is to strip it of those incidents which are beneficial to him. Typically, an employment relationship is one where services are rendered in exchange for wages, and wages, of course, constitute the most important benefit accruing to the employee. In addition, however, he may receive added rights, benefits and privileges, such as seniority rights, rights to free transportation, benefits of hospitalization plans, etc., etc. Insofar as it is possible to maintain all these in the employee, it is possible to guarantee that he will be placed in no worse position with respect to his employment through a system of payments and guarantees which, without providing for an actual continuance of the employment itself, provides for a continuance of the benefits which the employee derives therefrom. Loss of wages may be compensated for through a system of dismissal and displacement allowances. Seniority rights may be preserved through the granting of leaves of absence.

Hospital and other privileges may be continued by the carrier at the order of the Commission. (For examples of suggested conditions preserving these supplemental benefits of the employment relationship, see Exhibit A-79, paragraph 8.) Accordingly, it is entirely possible for the Commission to impose conditions in connection with its order which will insure that no employee will be put in a worse position with respect to his employment without requiring that existing active service be maintained for 4 years or any other period in the future.

Therefore, we conclude that a comprehensive system of dismissal and displacement allowances plus reasonable assurance of the continuance of certain minor employee rights and privileges for a period of 4 years will place the employee in no worse position with respect to his employment than that which he occupied before the lease, and that such a system will accomplish this result as fully as the actual continuance of active employment during this period. Thus, insofar as the language of the statute is concerned, the Commission can satisfy the statutory minimum provided by Section 5 (2)(f) by attaching conditions providing for a system of allowances and continued benefits such as that recommended by us.

The Commission ultimately denied the application in *Fort Worth*, finding that "[t]he amount of future savings is uncertain and problematical. No present advantage in the public interest is shown" (247 I.C.C. at 127). Chairman Eastman, dissenting, stated (*id.* at 132 (emphasis added)):

Even if no employee thus displaced or demoted were able to obtain equal or better compensation in other employment, some would, no doubt, die or retire during the period, thus releasing savings for the railroad. Under present conditions, however, it is very probable that these employees, particularly the mechanics, could obtain employment elsewhere and in many instances at equal or better compensation. *In my judgment, Congress did not, broadly speaking, intend to do more than protect the employees in the compensation they were receiving prior to the transaction. To the extent that they obtain such compensation elsewhere, the railroad should be released from payment.* If I am right in this interpretation, therefore, it is probable that under present conditions the applicant would soon be able to enjoy a very large part of the savings.

RLEA's interpretation of Section 5(2)(f), as stated in the *Fort Worth* case, was also the interpretation given to the section by the Commission in its 55th Annual Report to Congress in 1941 (p. 61):

Briefly, the conditions require that during the protective period provided in paragraph 2(f) of the act, a displaced employee—that is, one who is retained in service by the applicants but placed in a worse position with respect to his compensation and the rules governing his working conditions—should be paid a displacement allowance; that any employee deprived of employment should be paid a dismissal allowance; and that no employee should be deprived of benefits other than wages attached to his previous employment, such as

free transportation, hospitalization, et cetera. . . .

These views were further elaborated, a few years later, in *Baltimore & O. R. Co. Operation*, 261 I.C.C. 615 (1946). In that case, the applicant railroad sought certain trackage rights over owned and leased lines of the New York Central Railroad. One effect of approving the transaction would have been to render unnecessary a prior arrangement between the applicant (B. & O.) and the Pere Marquette Railway, under which the latter operated certain through trains of the B. & O. over the same or parallel tracks as those in issue. The question presented was whether the B. & O. was responsible for any employees of the Pere Marquette who would be dismissed.

During the oral argument before the full Commission, counsel for RLEA was asked how protec-

"We also note that, in 1945, RLEA drafted and recommended to Congress (92 Cong. Rec. 7218-7219) a proposal which was designed to make certain that displacement allowances, as well as dismissal and separation allowances, would be treated as compensation for purposes of the Railroad Retirement Act. Mr. Latimer, chairman of the Railroad Retirement Board, explained during the hearings (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., Feb. 1, 1945, at p. 162):

That is, for example, if a payment should be made under the terms of the Washington agreement of 1936 to a person who was displaced entirely from the service of the railroad by reason of a consolidation of two or more railroads, I think there is no question but what under existing regulations the Board would give credit for that payment as compensation for time lost. However, the case is not so clear if the payment is made by reason of displacement to a less remunerative position.

The clarifying legislation was enacted, 45 U.S.C. 228a(h).

tion of the Pere Marquette employees should be affected. The following colloquy occurred:"

Mr. MULHOLLAND [for RLEA]. As I see it, the Commission could issue an order to the B. & O. conditioning the granting of this application on their making provision for the protection of the employees of the Pere Marquette who might be out of a job.

Commr. AITCHISON. How could they do that?

Commr. PORTER. What would we say the B. & O. should do, now, to protect men that may [have] lost some seniority, or something, on another railroad?

Mr. MULHOLLAND. I don't think the Commission has ever gone to the extent of trying to fix seniority rights. It is purely a question of wages. All the conditions the Commission has imposed in any of these cases has not attempted to go into the operation of the collective bargaining agreements, and to regulate the seniority and the pensions, and all those things involved in collective bargaining agreements. *It comes down pretty much to a question of compensation.*

On brief, RLEA argued: "As the Commission is aware, this statute was passed to render mandatory a form of protection already made available in some cases by the Commission's own action. (*U.S. vs. Lowden*, 308 U.S. 225) * * *."

Although the Commission refused to enter the order requiring B. & O. to be responsible for Pere Mar-

" Transcript of oral argument held February 13, 1946, in Finance Docket No. 14891, pp. 243-44 (emphasis added).

" Reply of RLEA to Applicant's Exceptions to Proposed Report, filed Aug. 20, 1945, in Finance Docket No. 14891, p. 9.

quette employees, it specifically reserved jurisdiction (261 I.C.C. at 618). In denying the union request, the Commission not only expressly agreed with the union's contention that compensation was now required under Section 5(2)(f), but also concluded (261 I.C.C. at 620-621):

* * * there is an even more serious objection to the suggestion made by interveners, and that is that the statute cannot be restricted to protection against loss in job compensation alone. Clearly the statute is not so restricted but includes loss with respect to pensions, hospitalization, in the sale of homes, moving expenses, and much else. *Chicago, M., St. P. & P. R. Co. Trustees Construction*, 252 I.C.C. 49; *Chicago & North Western Trustee Abandonment*, 254 I.C.C. 820; *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177. Each of these proceedings, among other things, involved a co-ordination of facilities for which authority was sought under section 5(2).²⁷ * * *

Three years later, the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen intervened in Finance Docket No. 16395, *Chicago B. & Q. R. Co. Trackage Rights*, 271 I.C.C. 675 (1949), to protest the transaction, and urged the

²⁷ The Commission held, however (261 I.C.C. at 621):

As above stated, neither the Pere Marquette nor its facilities will be coordinated with the applicant or the New York Central by our approval of the transaction proposed here, and no practicable method has been suggested and none exists of which we are aware whereby the employees of the Pere Marquette can receive the benefits required by the statute. This situation, we believe, confirms our opinion based on the statute's language, that we are without the authority which interveners ask us to exercise.

Commission to reserve jurisdiction to impose compensatory protection, relying in their brief (pp. 11-15) on the Commission's discussion of pensions, moving expenses, etc., in the *Baltimore & O. R. Co. Operation* case (261 I.C.C. at 620-621), and stating that issues as to seniority and the determination of which employees lose jobs should be left to negotiation.

C. The Commission's Development of Terms and Conditions for Protective Compensation During the Past Twenty Years:

During the twenty-year period following the enactment of Section 5(2)(f), the Commission, with the active participation of the rail unions, has developed and refined various sets of conditions for the protection of employees. All of these deal with compensatory benefits. For the Court's convenience, we have listed in an appendix, *infra*, pp. 1a-23a, the published reports in cases which the Commission has decided under Section 5(2).²⁸ As the list shows, during the first few years, the Commission did not impose conditions of employee protection in the bulk of the cases because it expressly found, or the evidence clearly indicated, that no employees would be affected by the transactions, and no labor group intervened to protest the order. See, *e.g.*, *Illinois Central R. Co. Operation*, 242 I.C.C. 481, 483 (1940); *City of Galveston Acquisition, Operation, and Bonds*, 242 I.C.C. 605, 610 (1940); *Atchison, T. & S. F. Operation*, 244 I.C.C. 173, 175-176 (1941). In some

²⁸ The appendix follows the format of Appendix A, attached to the government's brief in the district court (pp. 47-70), which is now reprinted in appellants' brief as Appendix

of the early cases, in which there was either a labor union protest or the Commission itself concluded that there were unanswered questions as to the employees' situation, the Commission reserved jurisdiction so that it could enter orders to protect employees in the future, if necessary. See, e.g., *Minneapolis & St. L. R. Co. Reorganization*, 244 I.C.C. 357, 877, 390 (1941); *Wabash R. Co. Control*, 247 I.C.C. 365, 376 (1941); *Northern Pac. Ry. Co. Purchase*, 247 I.C.C. 513, 517 (1941).

In 1946, the Commission altered its procedure (see *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672, 675-676) and began to prescribe the so-called "North Western" conditions in the categories of cases noted above, i.e., those in which there was no showing of any effect on employees and those in which the future effect was indeterminate. The "North Western" conditions were simply a restatement of the statutory language. They directed a "fair and equitable arrangement" for any affected employees and that the employees be placed in no "worse position with respect to their employment."

In the same year, the Commission formulated its first comprehensive code of specific conditions for application in those cases in which the effects on employees were predictable. *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 193, 196; see *Chicago*, A (pp. 89-112). Cases which were inadvertently omitted in the original appendix are now included, and citations have been corrected. The appendix does not purport to exhaust the Section 5(2) cases before the Commission; the cases in which no report or order was published in the bound volumes of the Commission decisions would probably triple the number shown in the appendix.

M., St. P. & P.R. Co. Trustees Construction, 252 I.C.C. 49, 252 I.C.C. 287 (1942). These "Oklahoma" conditions expanded upon the conditions set out in the Washington Job Protection Agreement of 1936. The Washington Agreement allowed a dismissed employee an allowance for six months of 60 percent of his average wage if he had been employed one to two years; this allowance progressively increased until an employee with an excess of 15 years' service received 60 percent of his average monthly salary for five years. The "Oklahoma" conditions, in addition to making certain other changes in the "Washington" conditions, prescribed 100 percent protection for a maximum period of four years from the effective date of the Commission's order."

"We note that in *Gulf M. & O.R. Co. Abandonment*, 282 I.C.C. 811 (1952), in which the Commission imposed "Oklahoma" conditions, the Brotherhood of Maintenance of Way Employees urged that those conditions met the mandatory requirements of Section 5(2)(f). See Petition of Protestants Brotherhood of Maintenance of Way Employees and Railway Employees Department [A.F. of L.] for Reargument and Reconsideration by the full Commission, filed April 11, 1952, in Finance Docket Nos. 16989 and 16990, pp. 2-4.

The "Burlington" conditions, which the Commission has applied in a number of abandonment cases, are substantially similar to the "Oklahoma" conditions. *Chicago, B. & Q.R. Co. Abandonment*, 271 I.C.C. 261 (1948).

Moreover, in numerous cases over the course of the last fifteen years, the railroads and the brotherhoods have stipulated for compensatory protection. See, e.g., *Wheeling & L.E. Ry. Co. Control*, 267 I.C.C. 163, 184 (1946); *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 235 (1947); *Wheeling & L.E. Ry. Co. Lease*, 271 I.C.C. 713, 751 (1949); *Detroit, T. & I.R. Co. Control*, 275 I.C.C. 455, 487 (1950); *Valdosta S.R. Purchase*, 282 I.C.C. 705, 711-712 (1952); *South Georgia Ry. Co. Control*, 290 I.C.C. 281, 282 (1954); *Erie R. Co. Trackage Rights*, 295 I.C.C. 303,

In 1952, the Commission, on remand of the *RLEA* case, formulated an even more comprehensive code of protective conditions. At the behest of employee groups, the Commission superimposed the conditions of the Washington Agreement on the "Oklahoma" conditions. *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952).³⁰ The purpose of the "New Orleans" conditions was to protect both the employees promptly affected by the transaction and those who might be affected after the expiration of the four-year period referred to in Section 5(2)(f). These conditions, which were applied by the Commission in the instant proceeding, go beyond any type of protection previously provided and exceed, in terms of their duration, the requirements imposed by the second sentence of Section 5(2)(f).³¹

305 (1956); *Toledo, P. & W.R. Co. Control*, 295 I.C.C. 523, 544 (1957); and *Delaware, L. & W.R. Co. Trackage Rights*, 295 I.C.C. 746, 755-756 (1958).

³⁰ In the *New Orleans* case, RLEA continued to urge that "[t]he fundamental purpose of Section 5(2)(f), as clearly disclosed by its legislative history and by the decisions of the courts, was to provide railroad employees who are dismissed or displaced from their jobs, as a result of railroad consolidations, with financial assistance, through compensatory allowances, to tide them over a reasonable period of readjustment to their changed economic circumstances." Brief of RLEA, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, and Order of Railway Conductors of America, filed September 19, 1951, in Finance Docket No. 15920, p. 15.

³¹ To bring the administrative practice up to date, we note one other recent development. In the last several years, the Commission has initiated a different practice in cases of the kind to which it had previously applied the "North Western" conditions. It has begun to prescribe specific self-implementing conditions, along the lines of the "Oklahoma" conditions,

WHETHER THE NEW ORLEANS CONDITIONS IMPOSED BY THE COMMISSION PROVIDE ADEQUATE COMPENSATION IS NOT AN ISSUE BEFORE THIS COURT

Although its argument to the Commission and its complaint in the district court (R. 1-9) were grounded solely upon the claim that the language and history of Section 5(2)(f) required the Commission to preclude the merged railroads from discharging any employees, appellants' brief to the Court (pp. 2-3, 20-26) appears to argue that the Commission decision was erroneous for an additional reason—namely, that the "New Orleans" conditions imposed by the Commission in this case provided only "partial financial compensation." Appellants also contend that the district court erred in failing to consider evidence on this point which they had introduced during the course of the hearing before Judge Thornton on their motion for a temporary restraining order (Br. 85-86).

We believe that the district court was plainly correct, for several reasons, in refusing to consider evidence as to adequacy of financial protection: *first*, because the evidence was not initially presented to the

regardless of the showing of adverse effect in the original proceeding. It has done this in order to remove potential delay in compensating employees in the event that they are in fact adversely affected by the transaction involved. See, e.g., *Missouri-K. T. R. Co. Consolidation*, 312 I.C.C. 13, 29 (1960).

In only one case, over the years, has the Commission frozen employees to their jobs. That was done temporarily pending a full consideration of the effect of the transaction on the employees. *Baltimore Steam Packet Co. Acquisition and Control*, 244 I.C.C. 583, 605 (1941).

Commission; "second, because it was directed to a question not presented by the complaint;" and *third*, because one party's tender of evidence in support of an application for a restraining order hardly constitutes an adequate record for purposes of adjudicating the merits of the Commission's order.

If appellants believe that the compensatory conditions prescribed by the Commission are not adequate, this is a matter initially for the Commission, rather than the courts. Cf. *Far East Conference v. United States*, 342 U.S. 570, 574-575. Moreover, despite appellants' failure to raise this matter before the Commission prior to its approval of the merger application, the Commission unquestionably has authority under Section 5(9) of the Act, authorizing the issuance of orders supplemental to orders issued under Section 5(2)(f) "for good cause shown," to consider contentions which appellants may now wish to develop concerning the adequacy of the "New

" See *United States v. Jones*, 338 U.S. 641, 673; *Tagg Bros. v. United States*, 280 U.C. 420, 444; *Louisville & N. R.R. v. United States*, 245 U.S. 463, 466. Appellants' reliance upon *United States v. Idaho*, 298 U.S. 105 and *Baltimore & O. R.R. v. United States*, 298 U.S. 349, is misplaced. The former permitted the district court to admit additional testimony relating to a jurisdictional fact "left by Congress to the decision of a court" (298 U.S. at 109). See *Shields v. Utah Idaho R.R.*, 306 U.S. 177, 185. The *B & O* case involved a question of constitutionality. In the case at bar, the proffered evidence as to the adequacy of the compensatory conditions goes to the merits of the Commission's decision, not to the agency's jurisdiction over the subject matter or the constitutionality of its action.

" See *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38; *Unemployment Commission v. Aragon*, 329 U.S. 148, 155; *United States v. Hancock Truck Lines*, 324 U.S. 774, 779-800.

Orleans" conditions. The Commission, we wish to state, is fully prepared to accord appellants full opportunity to make a supplementary presentation.

Appellants suggest that the alleged failure of the "New Orleans" conditions fully to compensate employees who might be discharged by the merged railroad shows that only by precluding any discharges could the employees, as a matter of fact, be preserved in a position "with respect to their employment" as good as that previously enjoyed. In the absence of any record on the matter before the Commission, we do not attempt to resolve here the validity of their claims of inadequacy. It is enough for present purposes to note that none of the three instances of alleged deficiency in the protection provided—the failure to provide compensation for possible multiple moves (Br. 21-23); the asserted loss of accumulated annuity rights under the Railroad Retirement Act (Br. 23-24); the danger of permanent loss of employment in the railroad industry in which affected employees have developed peculiar skills (*ibid.*)—justifies appellants' conclusion.

If the Commission could require that the first employee move be paid for, it could obviously do so for subsequent moves if this is in fact a significant problem. Similarly, it can provide compensation for the accrued value of any annuity rights a discharged employee conceivably might lose." As for permanent

"We do not believe, however, that the employees' accrued rights in the railroad retirement system will be adversely affected during the four-year protective period. We have ascertained from the Railroad Retirement Board that monthly payments made to dismissed or demoted employees pursuant

loss of employment in the railroad industry, we point out that the New Orleans conditions require the merged railroad to offer re-employment as jobs become available (R. 145-146)—in which event the employee reverts to the place in the seniority roster which he would have occupied had he remained continuously in active status (R. 144). On no theory of the statute is there a right of permanent employment with the carrier.

If it is appellants' position that a merged carrier must provide jobs even where attrition fails to create openings, it is the Commission's belief that appellants are urging an outcome which would generate serious and vexing difficulties and impede the effective consummation of mergers." The National Transportation Policy seeks to foster "sound economic conditions in transportation", and Congress has long

to the "New Orleans" conditions or the Washington Agreement are treated as compensation, and the period during which such payments are made is treated as service, under the Railroad Retirement Act. Following the four-year protective period, the retirement credits of those with less than ten years' service who are no longer employed in the railroad industry will be transferred to the Social Security System. If the employee has had 10 years or more of service in the railroad industry, the accumulated fund will be retained by the Railroad Retirement Board, and at retirement he will receive both railroad retirement and social security.

"Appellants state (Br. 25) that "If fewer employees are needed by the merged railroad than were needed by its predecessor railroads, the surplus will be absorbed and swiftly eliminated by natural attrition." But attrition, to the extent that is predictable, will doubtless vary widely from craft to craft. Moreover, under the "New Orleans" conditions, as noted above, Erie-Lackawanna must offer re-employment as jobs become available."

sought to encourage mergers which are consistent with this objective. The recent economic trials of many carriers—including Erie-Lackawanna³⁶—indicate that the implementation of sound merger proposals is a matter of pressing concern. This is not to suggest that the protection of employee interests is unimportant or secondary. The Commission's position is this: that the complexities involved in realizing the benefits of a merger will be aggravated if jobs and incidental facilities must be maintained in circumstances where there is no longer work to perform (see R. 26); that Section 5(2)(f) should not be interpreted so as to impede otherwise desirable mergers unless that result is required by a clear Congressional command; that such a command is lacking here; and that the full measure of statutory protection to which appellants are entitled may be provided by compensatory benefits.

³⁶ In 1960, Erie-Lackawanna reported a combined loss of almost 20 million dollars, approximately double 1959's deficits. Inability to realize merger economies promptly is a clear threat to solvency. We note in this connection that on February 28, 1961, Erie-Lackawanna applied to the Commission pursuant to Part V of the Act for a guarantee of a \$15,000,000 loan to it. Under Section 504(a)(1), the Commission may not make such a guaranty unless it finds that "without such guaranty, * * * the carrier would be unable to obtain necessary funds, on reasonable terms, for the purposes for which the loan is sought."

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
14891	4-11-46	Baltimore & O. R. Co. Operation.	261 ICC, 615, 618- 621	RLEA et al.	Juris. Reserved	No showing made of probable adverse effect on employees of appli- cant and N.Y. Central; no jurisdiction to pro- tect others nor is any method available for granting full compensa- tion.
15100	2-5-46	Gulf, M. & O. R. Co. Purchase.	623, 625	No	None	Agreement reached.
15250	5-29-46	Chicago & N. W. Ry. Co. Merger.	672, 674- 675	RLEA	North West- ern *	Employees unaffected but language of statute to be used uniformly as a matter of policy and to avoid future procedural difficulties in reopening the proceeding.
14500	6-28-46	Seaboard Air-Line Ry. Co. Receivership.	689, 722	No	North West- ern	Employees unaffected.
15321	6-21-46	Pere Marquette Ry. Co. Trackage Rights.	750, 754	No	North West- ern	Applicant states em- ployees will be unaffected.
14992	6-26-46	Central R. Co. of Pennsylvania Lease.	755, 779	Labor Org.	North West- ern	Employees unaffected.
15158	8-7-46	St. Louis, S. F. & T. Ry. Co. Trackage Rights.	267 ICC 30, 36-37	Labor Org.	North West- ern	Effect on employees uncertain.
14677	9-13-46	Chicago, B. & Q. R. Co. Abandonment.	38	No	None	Application dismissed on other grounds.
12859	2-27-47	St. Louis National Stockyards Co. Lease.	80	No	None	Not in issue.
14931	2-10-47	Gulf, M. & O., R. Co. Purchase, Securities.	145, 148- 150	Labor Orgs.	North Western	Applicant states em- ployees will not lose work or compensation, but not definitely shown no employees will be affected.
15181	12-10-46	Wheeling, & L.E. Ry. Co. Control.	163, 184	RLEA	Washington & North Western	Former stipulated; latter imposed for em- ployees not represented by RLEA.

* The "North Western conditions," which in statutory language require that no employee be placed in a worse position with respect to his employment for four years depending on his term of rail service, are treated herein as non-self-executing conditions or in effect a reservation of jurisdiction. See also note 5 *infra*.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MARCH 1961.

APPENDIX

The following are the reported Section 5 cases decided since the enactment of Section 5(2)(f) on September 18, 1940, and reported in the bound volumes of Commission reports:

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
12830	10-18-40	Union Term. Ry. Co. & St. Joseph Belt Ry. Co. Control.	242 ICC 197, 212	No	None	Employees unaffected.
13007	10-29-40	Illinois Central R. Co. Operation.	481, 483	No	None	<i>Ibid.</i>
12992	11-9-40	Virginian Ry. Co. Operation.	503, 504	No	None	<i>Ibid.</i>
12958	11-26-40	Madison, I. & St. L. Co. Purchase.	586, 588	No	None	<i>Ibid.</i>
13076	11-28-40	City of Galveston Acquisition, Operation, and Bonds.	605, 610	No	None	<i>Ibid.</i>
12973	11-29-40	Denver & R. G. W. R. Co. Trustees Abandonment.	619, 620	No	None	<i>Ibid.</i>
14931	3-10-47	Gulf, M. & O. R. Co. Purchase, Securities.	267 ICC 201	No	North Western	Supp. to decision of 2-10-47, approving carriers' agreement to share protection costs; Commission had earlier required agreement be reached as condition to approving the transaction.
15181	3-10-47	Wheeling & L.E. Ry. Co. Control.	203	No	None	Not in issue; stock control case.
15228	4-1-47	Pere Marquette Ry. Co. Merger.	207, 235	RLEA	Washington & North Western	Former stipulated; latter for unrepresented employees.
14931	5-8-47	Gulf, M. & O. R. Co. Purchase, Securities.	265	RLEA	Washington & North Western	<i>Ibid.</i>
15685	6-25-47	Wheeling & L. E. Ry. Co. Control.	401, 411	No	North Western	Employees unaffected.
15711	8-18-47	Southern Pac. Co. Reincorporation.	523, 533	No	North Western	Applicant states employees unaffected.
15605	12-8-47	Niagara Junction Ry. Co. Control.	649, 661	No	North Western	Employees unaffected.
13085	12-18-47	Chicago, M., St. P. & P. R. Co. Trustees Construction.	690, 696	No	4-year compensation.	[See prior reports, 252 I.C.C. 49 and 287; 257 I.C.C. 292.]
15920	4-7-48	New Orleans Union Passenger Terminal Case.	763	RLEA et al.	Oklahoma	
16041	5-21-48	Beech Creek R. Co. Control.	271 ICC 1, 4	No	North Western	Applicant states employees unaffected.
14692	5-10-48	Chesapeake & O. Ry. Co. Purchase.	5	No	None	Application denied on other grounds.
15365	7-6-48	Chicago, B. & Q.R. Co. Control.	63	Labor Orgs.	None	<i>Ibid.</i>
16042	10-7-48	Union Belt Ry. Oakland Control.	223, 226	No	North Western	Employees unaffected.
15785	10-20-48	Chicago, B. & Q. R. Co. Abandonment.	261	Labor Org.	Burlington	
16325	5-5-49	Gulf, M. & O. R. Co. Purchase.	659, 665	No	North Western	Applicant does not contemplate that any employee will be adversely affected.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
12975	12-3-40	Wichita Falls & S. R. Co. Acquisition.	242 ICC 659, 664	No	None	<i>Ibid.</i>
13028	12-3-40	Chesapeake & O. Ry. Co. Operation.	665, 666	No	None	<i>Ibid.</i>
13026	12-18-40	Pennsylvania R. Co. Operation.	693	No	None	New R.R. line to be built.
12382	12-21-40	Dayton Union Ry. Co. Acquisition.	727, 732	No	None	Employees unaffected.
13003	12-21-40	Baltimore & O. R. Co. Operation.	763, 764	No	None	<i>Ibid.</i>
13008	12-30-40	Texas & P. Ry. Co. Operation.	775, 776	No	None	<i>Ibid.</i>
13015	1-7-41	Erie R. Co. Trustees Purchase.	244 ICC 13, 19	No	None	<i>Ibid.</i>
13017	12-30-40	Atchison, T. & S. F. Ry. Co. Operation.	32, 36	No	None	<i>Ibid.</i>
13058	1-25-41	Winchester & W. R. Co. Purchase.	150, 152	No	None	<i>Ibid.</i>
13156	1-27-41	Atchison, T. & S. F. Operation.	173, 176	No	None	<i>Ibid.</i>
11317	2-13-41	Louisiana & A. Ry. Co. Operation.	235, 236	No	None	<i>Ibid.</i>

12414	3-4-41	Minneapolis & St. L. R. Co. Reorganiza- tion.	357, 377	RLEA	Juris. Reserved	Possibility of employees being adversely affected is remote.
12698	4-9-41	New York Central R. Co. Operation.	550, 554	No	None	Employees unaffected.
13118	4-7-41	Louisiana & A. Ry. Co. Operation.	577, 580	No	None	<i>Ibid.</i>
13100	4-15-41	Baltimore Steam Packet Co. Acquisition and Control.	583	No	Juris. Reserved ¹	
13242	5-26-41	Cleveland & P. R. Co. Purchase.	793	No	Compensation for 4 years	
12656	5-8-41	Chicago, M., St. P. & P. R. Co. Trustees Operation.	247 ICC 1, 8	No	None	Employees unaffected.
13137	5-14-41	Chester & Mt. V. R. Co. Lease.	11, 13	No	None	<i>Ibid.</i>
13247	5-27-41	Greenbrier, C. & E. R. Co. Lease.	24, 26	No	None	<i>Ibid.</i>

¹ In this case the Commission under section 5(2)(c) imposed a temporary job freeze pending determination of the effect of the transaction upon the carrier's employees (at 605). No other case has been found in which even a temporary stay was imposed by the Commission following the enactment of section 5(2)(f).

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
16395	7-6-49	Chicago, B. & Q. R. Co. Trackage Rights.	271 ICC 675, 690-691	RLEA et al.	Washington & North Western	Little loss of employment likely; former conditions stipulated; latter imposed for others not represented by stipulating unions.
16308	7-21-49	Wheeling & L.E. Ry. Co. Lease.	713, 751	RLEA et al.	Washington and North Western	Former stipulated; effect on other employees cannot be ascertained.
16047	9-9-49	International G.N.R. Co. Trustee Trackage Rights.	275 ICC 27	Labor Orgs.	Oklahoma	
9915	8-2-49	Missouri Pac. R. Co. Reorganization.	59, 141-142	RLEA	North Western	Record does not indicate effect on employees; RLEA asks for North Western.
16378	9-19-49	Banner & L.E.R. Co. Merger.	167, 180	No	North Western	Applicant states employees unaffected.
16697	12-14-49	Gulf, M. & O.R. Co. Purchase.	197, 201-202	No	North Western	It is not contemplated any employee will be adversely affected.
9918	12-29-49	Missouri Pac. R. Co. Reorganization.	203, 256	RLEA	North Western	[See prior report.]

16592	3-7-50	Houston Belt & Term. Ry. Co. Control.	289, 313	Labor Orgs.	Washington and North Western	Former stipulated; extent of effect on others cannot be forecast.
16042	4-26-49	Union Belt Ry. of Oakland Control.	343, 344	No	North Western	It does not appear employees will be adversely affected.
16809	6-1-50	Cambria & Indiana R. Co. Control.	360, 365	No	North Western	Applicant states no adverse effect expected.
16496	5-2-50	Detroit, T. & I.R. Co. Control.	455, 487	RLEA	Washington and North Western	Former stipulated; latter for employees not represented by RLEA.
16167	12-5-50	Southern Ry. Co. Purchase.	724, 737	No	North Western	It does not appear employees will be adversely affected.
15947	5-23-51	International G. N. R. Co. Trustee Trackage Rights.	282 ICC 30, 35-36	No	Oklahoma & North Western	Former agreed upon; latter for unrepresented employees although it does not at present appear others will be adversely affected.
16968	5-10-51	Savannah & A. Ry. Co. Control.	39, 57-58	RLEA et al.	Washington and North Western	Former imposed for employees represented; latter for others.
17573	1-16-52	Arkansas & L. M.	255, 263	No	North	Applicant states em-

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
13309	5-31-41	Burlington R. I. R. Co. Abandonment of Operation.	247 ICC 79, 84	No	None	<i>Ibid.</i>
13460	6-9-41	Fort Worth & Denver City Ry. Co. Lease.	119	RLEA et. al.	None	Application dismissed on other grounds.
13323	6-28-41	Atchison, T. & S. F. Ry. Co. Merger.	173, 179	No	None	Employees unaffected.
13230	6-26-41	Moosic Mountain & C. R. Co. Purchase.	241, 244	No	None	<i>Ibid.</i>
12843	7-8-41	Texas & P. Ry. Co. Operation.	285	RLEA et al.	4-year compensation	
12859	7-30-41	St. Louis National Stockyards Co. Lease.	359, 363	No	None	Employees unaffected.
13225	9-29-41	Wabash R. Co. Control.	365, 375-376	No	Juris. Reserved	Employees immediately unaffected.
13194	8-9-41	Illinois Central R. Co. Operation.	415, 420	No	None	Employees given more work, more pay.
13326	8-14-41	Gulf, M. & O. R. Co. Operation.	435, 438	No	None	Employees unaffected.
13276	8-25-41	Montour R. Co. Operation.	503, 505	No	None	<i>Ibid.</i>

13243	8-25-41	Durham & S. C. Co. Lease.	509, 512	No	None	<i>Ibid.</i>
13310	8-25-41	Northern Pac. Ry. Co. Purchase.	513, 517	No	Juris. Reserved	Employees immediately unaffected.
13010	7-29-41	Wabash Ry. Co. Receivership.	581, 622	No	None	Employees unaffected.
9033	8-28-41	Texas & N. O. R. Co. Operation.	624, 628	No	None	<i>Ibid.</i>
13218	9-2-41	Missouri Pac. R. Corp. in Nebraska Trustee Operation.	653, 656-657	No	None	Agreement reached on division of work and working conditions.
13306	8-27-41	Fort Worth & D. C. Ry. Co. Operation.	658, 660	No	None	Employees unaffected.
13393	10-3-41	Unadilla Valley Ry. Co. Purchase.	249 ICC 1, 4	No	Juris. Reserved	Employees immediately unaffected.
11915	10-3-41	Erie R. Co. Reorganization.	279, 287	No	None	Employees unaffected.
13384	10-28-41	Southern Ry. Co. Purchase.	357, 359	No	None	<i>Ibid.</i>
11915	10-27-41	Erie R. Co. Reorganization.	413, 425	No	None	<i>Ibid.</i>
13382	10-25-41	State Line & S. R. Co. Control.	441, 444	No	None	<i>Ibid.</i>

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
15920	1-16-52	New Orleans Union Passenger Terminal Case.	282 ICC 271	Labor Orgs.	New Orleans	
17522	2-20-52	Rockdale, S. & S. R. Co. Operation and Control.	297, 302	No	North Western	Record does not disclose effect on employees.
17584	3-31-52	Chesapeake & O. Ry. Co. Trackage Rights.	304, 305	Labor Orgs.	North Western	Trainmen protest withdrawn on understanding NW would be imposed.
16989	3-7-52	Gulf, M. & O. R. Co. Abandonment.	311	Labor Org.	Oklahoma	
17539	3-25-52	Chicago, R.I. & P. R. Co. Acquisition.	344	RLEA et al.	Burlington	
12347	3-31-52	New York Connecting R. Co. Trackage Rights.	353, 356	No	North Western	Transaction involves no change in method of operation.
17573	7-14-52	Arkansas & L.M. Ry. Co. Control.	564, 566	No	None	Present services unaffected.
17134	8-31-51	Pacific Coast R.R. Co. Control.	600, 608-609	Labor Orgs.	Washington and North Western	Former agreed upon; latter for those not protected by the stipulations.

16690	10-17-52	Gulf, M. & O. Ry. Co. Trackage Rights.	689		[See prior report above.]	
17893	12-12-52	Valdosta S. R. Purchase.	705, 711-712	Labor Orgs.	Washington, Burlington and North Western	Former two stipulated; last imposed for employees not covered under the stipulations.
17217	3-2-53	South Western R. Co. Control.	714, 723	No	North Western	Carrier to be acquired has no employees.
18118	5-29-53	United New Jersey R. & C. Co. Control.	737, 740	No	North Western	It has not been shown that interest of carrier employees will be adversely affected.
13490	3-27-53	New Jersey & N. Y. R. Co. Reorg.	290 ICC 9, 34-35	No	North Western	Employees unaffected.
18068	8-4-53	Alabama & V. Ry. Co. Control.	36, 39	No	North Western	Subject carrier has no employees.
17585	8-17-53	St. Louis S. W. Ry. Co. of Texas Abandonment.	53	Labor Org.	Oklahoma	
17992	8-7-53	Harris County Houston Ship Channel Nav. Dis. Operation.	83, 92	No	North Western	Applicant states employees unaffected.
17954	10-23-53	Arkansas & L. M. Ry. Co. Construc-	112, 117	No	North Western	Employees unaffected.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
13475	11-12-41	Wheeling & L. E. Control.	249 ICC 490, 494	No	None	<i>Ibid.</i>
13456	11-15-41	Los Angeles Union Stock Yards Co. Lease.	499, 502	No	None	<i>Ibid.</i>
13515	11-18-41	Harriman & N. E. R. Co. Abandonment.	518, 520	No	Juris. Reserved	Applicant expects the one affected employee to be given employment but this is not certain. Employees unaffected.
13377	12-4-41	Missouri Pac. R. Co. Trustee Purchase.	568, 570	No	None	<i>Ibid.</i>
13332	12-6-41	Texas & N.O.R. Co. Operation.	595, 598	No	None	<i>Ibid.</i>
11915	12-13-41	Erie R. Co. Reorganization.	639, 649	No	None	<i>Ibid.</i>
13513	12-6-41	Southern Iowa Ry. Co. Purchase.	653, 655-656	No	None	<i>Ibid.</i>
13551	12-23-41	Franklin & T.R. Control.	743, 744	No	None	<i>Ibid.</i>
13555	12-24-41	Boston & M.R. Operation.	755, 756	No	None	<i>Ibid.</i>

13541	12-30-41	New York, S.&W.R. Co. Trustee Operation.	758, 760	No	None	<i>Ibid.</i>
13554	12-23-41	Boston & M.R. Operation.	761, 762	No	None	<i>Ibid.</i>
13550	12-23-41	Boston & M.R. Operation.	763, 764	No	None	<i>Ibid.</i>
13497	12-30-41	New York, S. & W.R. Co. Trustee Purchase.	777, 781	No	None	<i>Ibid.</i>
13085	1-17-42	Chicago, M., St. P.&P.R. Co. Trustees Construction.	252 ICC 49	RLEA	4-year compensation	[See also supplementary reports regarding the protective period at 252 I.C.C. 287 and 257 I.C.C. 292.] Employees unaffected.
13385	1-27-42	Kansas City S. Ry. Co. Purchase.	113, 116	No	None	<i>Ibid.</i>
13539	2-7-42	Port San Luis Transp. Co. Purchase Operation and Stock.	137, 141	No	None	<i>Ibid.</i>
13730	6-8-42	Cuyahoga Valley Ry. Co. Control	683, 689	No	Juris. Reserved	<i>Ibid.</i>

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
18116	12-18-53	St. Louis S. W. Ry. Co. of Texas Lease.	290 ICC 205	Labor Orgs.	New Orleans	
18180	1-20-54	Sacramento N. Ry. Trackage Rights.	229, 231	No	North Western	Record does not show employees adversely affected. Applicant states employees unaffected.
18540	6-25-54	Arkansas & L. M. Ry. Co. Control.	243, 248	No	North Western	
18249	7-13-54	South Georgia Ry. Co. Control.	281, 282	RLEA et al.	Oklahoma	
18163	6-10-54	Wichita Falls & S. R. Co. Abandonment.	303, 323	RLEA et al.	Burlington and North Western	Former prescribed for the life of the carrier to be abandoned not to exceed 4 years; latter also imposed since properties will still be operated after 3-year test period. Employees unaffected.
9033	8-4-54	Texas & N. O. R. Co. Operation.	355, 361	No	North Western	
18273	12-23-54	Louisiana & A. Ry. Co. Abandonment.	434	RLEA et al.	Burlington & Oklahoma	
9918	7-29-54	Missouri Pac. R. Co. Reorganization.	477, 612-613	RLEA	New Orleans	

9033	12-21-54	Texas & N. O. R. Co. Operation	689, 694	No	North Western	Employees unaffected.
18656	3-2-55	Louisville & J. B. & R. Co. Merger.	725, 746-47	No	North Western	<i>Ibid.</i>
18540	4-12-55	Arkansas & L. M. Ry. Co. Control.	750, 752	No	North Western	<i>Ibid.</i>
18617	9-27-55	Sacramento N. Ry. Trustees Abandonment.	295 ICC 73	RLEA et al.	Burlington	
18778	11-22-55	Wellsville, A. & G. R. Corp. Purchase and Control.	115	RLEA et al.	Oklahoma	
19182	8-27-56	Erie R. Co. Trackage Rights.	303	RLEA et al.	New Orleans	
18698	8-23-56	Camp Lejeune R. Co. Securities and Operation.	313	Labor Orgs.	None	Application dismissed on other grounds.
19829	2-5-57	Wisconsin Central R. Co. Operation.	413, 418-419	No	North Western	Applicant states employees unaffected.
9033	10-24-56	Texas & N. O. R. Co. Operation.	420, 424	No	North Western	Employees unaffected.
19315	12-20-56	Spokane International R. Co. Control.	425, 436, 439	RLEA et al.	North Western	Stock control case but coordination possible and employees request protection.
19432	12-28-56	Chicago, St. P., M.	441	RLEA	Oklahoma	

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
13793	8-14-42	Pennsylvania, O.&D.R. Co. Trackage Operation.	252 ICC 708, 710	No	None	<i>Ibid.</i>
8393	10-13-42	St. Louis S.W. Ry. Co. Control.	779	No	None	Petition dismissed on other grounds. Applicant states no employee will be in a worse position for more than a few days and no position will be entirely abolished. Employees unaffected.
13496	10-13-42	Pittsburgh, L. & W. R. Co. Purchase.	254 ICC 144, 154	No	Juris. Reserved.	
13956	11-24-42	Atchison, T. & S.F. Ry. Co. Merger.	159, 166	Emp.	None	
14054	12-29-42	Rio Grande, E.P. & S.F. R. Co. Lease.	196, 201	No	None	<i>Ibid.</i>
13496	3-8-43	Pittsburgh, L. & W. R. Co. Purchase.	202, 206	No	Juris. Reserved	Continued prior reservation of jurisdiction. Employees unaffected.
13610	3-9-43	Stockyards Ry. Co. Control.	207, 214	No	None	

13401	3-9-43	St. Paul Union Stockyards Co. Lease.	215, 220	No	None	<i>Ibid.</i>
14114	7-21-43	Erie R. Co. Purchase.	486, 490	No	None	<i>Ibid.</i>
14192	10-15-43	Kansas City Southern Ry. Co. Merger.	529, 533	No	None	<i>Ibid.</i>
14367	11-16-43	Wheeling & L.E. Ry. Co. Control.	633, 639	No	None	<i>Ibid.</i>
14360	11-26-43	Atlanta & C.A.L. Ry. Co. Bonds.	641, 650	No	None	<i>Ibid.</i>
9923	12-27-43	Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization.	694, 705	No	None	<i>Ibid.</i>
14433	5-15-44	Delaware, L. & W. R. Co. Merger.	257 ICC 91, 125	No	None	<i>Ibid.</i>
14221	5-17-44	Oklahoma Ry. Co. Trustees Abandonment.	177	RLEA	Oklahoma conditions	
14510	6-28-44	Canton, A. & N. R. Co. Lease.	346, 349	No	None	Employees unaffected.
14600	9-12-44	Delaware & H. R. Corp. Merger.	453, 476	No	None	<i>Ibid.</i>

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
18845	3-1-57	Louisville & N. R. Co. Merger.	295 ICC 457	RLEA et al.	New Orleans	
18698	2-12-57	Camp Lejeune R. Co. Securities and Operation.	511, 518	No	North Western	No showing of adverse effect on employees of the carriers directly involved.
18991	5-31-57	Toledo, P. & W. R. Co. Control.	523, 544	RLEA et al.	Washington	Conditions stipulated.
19159	7-9-57	Central of Georgia Ry. Co. Control.	563, 582-583	No	North Western	Applicant states employees unaffected.
19583	7-23-57	Durham & S. C. R. Co. Control.	585, 591	No	North Western	<i>Ibid.</i>
19677	4-14-58	Illinois Central R. Co. Merger.	731, 741	No	North Western	Employees unaffected.
19989	7-24-58	Delaware, L. & W. R. Co. Trackage Rights.	743	RLEA et al.	New Orleans	Conditions stipulated.
13170	11-3-58	Florida East Coast Ry. Co. Reorganization.	307 ICC 5	RLEA	New Orleans	
20026	9-7-59	Chicago S. S. & S. B. R. Trackage Rights.	329, 351	No	North Western	Employees unaffected.
20599	10-8-59	Norfolk & W. Ry. Co. Merger.	401, 439	RLEA et al.	Stipulated and Oklahoma	

19453	12-8-59	St. Johnsbury & L. C. R. Control.	489	RLEA et al.	[See Previous Report.]	
19538	10-5-59	Illinois Central R. Co. Construction and Trackage.	493, 529	No	North Western	No indication employees affected.
20852	12-11-59	Atlantic Coast Line R. Co. Merger.	614	RLEA	Oklahoma	
12347	2-8-60	New York Connecting R. Co. Trackage Rights.	702	No	Oklahoma	
20751	3-28-60	Missouri-K.-T. R. Co. Consolidation.	312 ICC 13	RLEA	Oklahoma	
20438	4-7-60	Cornell Steamboat Co.-Purchase-Lowery.	55	No	None	Employees unaffected.
20956	4-28-60	Chicago, M. St. P. & P.R. Co. Trackage Rights.	75	No	Oklahoma	
21024	6-3-60	Winston-Salem Southbound Ry. Co. Control.	138	No	Oklahoma	
20978	6-24-60	Texas & N.O.R. Co. Merger.	147	No	Oklahoma	

* In this and succeeding cases the Commission imposed the Oklahoma conditions, regardless of the showing of affect on employees, as "self-executing" conditions in the event that employees are affected.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
9918	7-4-44	Missouri Pac. R. Co. Reorganization.	257 ICC 479, 562- 563	RLEA	Fair and equitable arrangement ²	It will be necessary for debtor to apply to us before consummating the plan. Employees unaffected.
14501	9-30-44	Seaboard Ry. Co. Acquisition.	584, 591	No	None	<i>Ibid.</i>
14367	10-13-44	Wheeling & L.E. Ry. Co. Control.	713, 716	No	None	<i>Ibid.</i>
14706	12-30-44	Columbia & Millstadt R. Co. Purchase.	729, 733	Labor Org.	Juris. Reserved	Employees may lose overtime pay; reserva- tion of juris. requested by employees. Employees unaffected.
14642	10-21-44	Milwaukee Livestock Handling Co. Con- trol.	796, 800	No	None	<i>Ibid.</i>
14802	4-17-45	Fox Purchase	261 ICC 95, 99	No	None	<i>Ibid.</i>
14692	6-5-45	Chesapeake & O. Ry. Co. Purchase.	239, 260	No ³	None	<i>Ibid.</i>
14931	9-19-45	Gulf, M. & O. R. Co. Purchase, Securities.	405, 434	RLEA	Washington	Conditions stipulated;
14891	11-28-45	Baltimore & O. R. Co. Operation.	535, 544- 545	No	None	Employees of the car- rier-parties will be benefited; employees of another carrier in dis- continued joint traffic arrangement with appli- cant are unaffected by the transaction before the Commission. Employees unaffected.
6790	12-18-45	Nicholas, Fayette & Greenbrier R. Co. Lease.	546, 547	No	None	
14677	1-3-46	Chicago, B. & Q. R. Co. Abandonment.	549	No	4-year com- pensation	

² RLEA requested inclusion of certain provisions to protect employees or, as the Commission stated, that it "define the procedural requirements which otherwise must be followed by the representatives of the employees in obtaining such protection" (257 ICC at 562). The Commission in effect imposed "North Western" conditions, as it expressly did later. See 275 ICC at 141-42 and 256, discussed at p. 169, *infra*.

³ Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Engineers intervened in support of the application.

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No. 681

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

Appeal from the United States District Court for the
Eastern District of Michigan

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UNITED STATES OF AMERICA, ET AL., *Appellees*

**Appeal from the United States District Court for the
Eastern District of Michigan**

REPLY BRIEF FOR APPELLANTS

STATEMENT

The appellants believe it necessary to file a reply brief in this case despite the short time available because the appellees¹ have abandoned many of the argu-

¹ The United States of America and the Interstate Commerce Commission will be referred to hereinafter jointly as the "Government" and the appellee Erie-Lackawanna Railroad will be referred to as the "Erie-Lackawanna" or the "railroad".

ments used below and have designed new arguments in an attempt to sustain their position. The filing of this brief is also necessary to afford a clear understanding of the position of appellants in this case regarding the *type* of protection which they are convinced is provided by the second sentence of Section 5(2)(f):

Appellants would burden this Court unnecessarily if it set out in this brief a refutation of each and every fallacy inherent in the newly constructed arguments of the appellees. Many of the fallacies are quite apparent and, in any event, time does not permit the luxury of such an undertaking. Within the pages of this brief appellants will mention a comparative few of the many fallacies present in the briefs filed by the appellees.

Appellants ask the Courts indulgence for the manner in which this brief is written. Due to the time limitations involved, it was necessary to dictate the brief and have it printed without benefit of page or galley proofs.

At the outset appellants will state again their position as to the *type* of protection afforded by Section 5(2)(f). Then the various divisions of argument utilized by all parties will be covered, such as the plain meaning of the language of Section 5(2)(f), its legislative history, and so forth.

I

Appellants Do Not Contend That Section 5(2)(f) Requires a "Job Freeze" as That Term Is Defined in Appellees' Briefs

The term "job freeze" is repeated on almost every page of each of the briefs filed in this proceeding by the appellees. They insist that appellants take

the position that the second sentence of Section 5(2)(f) accords to railroad employees a strict, absolute, inflexible "job freeze". (G. 17, 19; EL. 2, 5, 14, 21.)²

Of course, the task of appellees is made immeasurably easier if they base their arguments upon the erroneous conclusion that appellants' view of the statute would prevent any adverse effect whatever from occurring to employees. From the starting point of "job freeze", many arguments can be concocted to show that such an interpretation is not supportable. For example, a claim of "job freeze" may not be supported by the plain language of the statute since that language might be interpreted as general and not specific (EL. 18); or because the language is not self-operating and some type of discretion is left to the Commission (EL. 21, 23). Such a major premise is handy when attempting to explain away the effect of the modified language in the Harrington Amendment and the unequivocal statements of Mr. Harrington himself and all those who spoke in support of that modified language (G. 35-36, 39).

The Government sets forth the "essence" of appellants' position, as follows (G. 19):

"The essence of appellants' position is that no employee of a consolidated railroad system should be *adversely affected* in any respect for a period of four years (or such lesser time as the employee had been employed by one of the merging railroads) from the effective date of the Commission's order." (Emphasis supplied)

² The letter "G" refers to the joint brief filed by the Government, the letters "EL" refer to the brief of the appellee railroad and the letter "A" refers to the brief for appellants.

And again (G. 17):

"* * * [appellants] claim that the general language in which the second sentence of the section is couched has a single specific and inflexible meaning: that an absolute job freeze must be imposed in every case in which the Commission approves a merger."

Since virtually all of appellees' arguments are constructed upon a foundation of misunderstanding, appellants believe it to be of paramount importance that their position as to the *type* of protection required by Section 5(2)(f) again be stated.

Appellants recognize that reasonable men may differ as to the detailed benefits which must be accorded employees beyond the mere retention of them in the active service of their employer. While appellants maintain that all employees must be retained in the active service of their railroad employers, they have never contended that "no worse position" meant an "absolute job freeze". Nor have appellants ever claimed that employees would not be "adversely affected in any respect" under the requirements of Section 5(2)(f), as they view them. Appellants believe that a man whose job is transferred is adversely affected but that may not be determined as placing him in a "worse position with respect to his employment." Employees who are required to take other jobs which do not pay quite as well are adversely affected even though such displaced employees may have the difference in wages made up by a displacement allowance. These adverse effects to employees, we believe, would occur should appellants' position be sustained.

Jobs may be transferred; employees may be required to take other, lower paying jobs. In short, as appel-

lants view Section 5(2)(f), the basic requirement contained in that statute is that each employee be continued in his employment in at least a comparable job at a comparable wage (any difference in wages to be made up by what is referred to in the railroad industry as a displacement allowance).

There is great flexibility here with which the Commission can work and appellants believe that it was to give the Commission some flexibility of action while retaining the employment protection concept unchanged that the language of the Harrington Amendment was modified.³

II

The Meaning of the Plain Language of Section 5(2)(f)

The appellees have put forth an entirely new argument in support of their contention that "worse position with respect to employment" requires protection only in the form of financial compensation.

The argument is quite ingenious and is strongly relied upon by both appellees. The Erie-Lackawanna sets forth this new argument as follows (EL. 10):

"Appellants' construction ignores the fact that the statute deals with 'affected' employees, which this Court has read in its ordinary sense of 'adversely affected'. *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 155. Under appellants' job freeze thesis, there would be no 'adversely affected' employees during the protective period of the second sentence of § 5(2)(f)."

³ For example, the original language of the Harrington Amendment prohibited *displacement* of employees to other and lower paying jobs, while the modified language of the Harrington Amendment permits such displacement.

The Government presents the argument in this manner (G. 11-12):

"In our view, the second sentence, with its provisions for the protection of 'affected' employees, requires that those who are economically injured in consequence of a Section 5 transaction receive a full measure of compensatory benefits for the statutory period. This means, in addition to compensation for lost wages, compensation for the other incidents of employment, such as costs of transfer, hospitalization, free transportation, and the like.

* * *

"Moreover, if all employees must be maintained in their existing employment following approval of a merger, it is difficult to understand the reference to employees 'affected' by the merger."

This argument would be reasonable *if* the statute was worded as appellees claim but, in fact, *it is not*.

The first sentence of Section 5(2)(f) clearly contemplates that employees will be adversely affected before the "fair and equitable arrangement" will be applied to them. That sentence is designed to protect the "interests of the railroad employees affected."

But the second sentence does not contemplate an employee being placed "in a worse position with respect to his employment" before *its* protection is applied to him. The authors of that provision made a significant change in referring to employees in the first and second sentences—while the first sentence refers to "employees affected" the second sentence refers to "employees of carriers affected". In other words, under the second sentence it was contemplated that no employee would be affected within the meaning of the Act and that

all employees of *carriers* affected must be kept "in no worse position with respect to their employment." Congress clearly intended no harm (with respect to employment) to be visited upon the employees of carriers affected by its orders.

This significant difference in treatment between the first and second sentences of 5(2)(f) with regard to the term "affected" strongly indicates that in the first sentence the use of the term "railroad employees affected" intended compensation protection and in the second sentence the use of the term "employees of carriers affected" intended employment protection.

At page 16 of its brief, the Government sets forth its belief "as to the *kind* of protection which is required" by Section 5(2)(f):

"* * * we believe that it imposes upon the Commission the duty to assure the employee entirely adequate compensation for the various incidents of employment which may be lost or impaired as a result of the merger."

The Government apparently believes that Section 5(2)(f) protects an employee in every element of his employment except active employment itself. (Cf. Government brief, page 11.)

"These 'various incidents' are referred to as those 'different types of benefits provided for in the Washington Job Protection Agreement of 1936' as well as the 'New Orleans' conditions (G. 16, n. 7). Such a view ignores the fact that the very purpose of Harrington and his colleagues was to give protection of a kind unlike that provided by the Washington Agreement."

III

Legislative History

As appellants emphasized in their brief (A. 50) the question of whether the language of the Harrington Amendment as it appeared in the Wadsworth motion to recommit was intended to have the same effect as the original language of the Harrington Amendment is the crucial question to be resolved in interpreting Section 5(2)(f). Appellants again emphasize that the term "worse position with respect to employment" as it appeared in the Wadsworth motion to recommit *was not changed* by the conferees in the Second Report. It was limited only with respect to the length of time it would be effective.

To whom do we go to find the meaning of the term used in the Wadsworth motion and in the present law? We go to the sponsors as this Court has often held should be done.⁵ The sponsors of the legislation who spoke were Mr. Harrington, Mr. Warren and Mr. Thomas. Each of these gentlemen spoke clearly and unequivocally to the effect that the term "no worse position with respect to employment" had precisely the same effect as the original language of the Harrington Amendment and that it was for *that* reason that they were supporting it and that, in their opinion, every member of the House should support it, particularly those 275 members of the House who had signed the petition requesting the conferees during the first conference to retain the Harrington Amendment in the bill. (A. 50-52, 54-56)

⁵ *Mastco Plastics Corp. et al. v. N.L.R.B.*, 350 U.S. 270, 288n, 76 S. Ct. 349, 100 L. Ed. 309; *Schweigmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 71 S. Ct. 745, 95 L. Ed. 1935; see also *S. H. Camp & Co. v. N.L.R.B.*, (6th Cir.) 160 F. 2d 519, 521 and cases cited therein.

Appellees have now recognized that in order to prevail they must demonstrate that the modified language was intended to have an entirely different substantive effect from the original language and this they know, they cannot do unless in some way they can destroy the effect of the words of Mr. Harrington, Mr. Warren and Mr. Thomas.

The Erie-Lackawanna is driven to the astounding contention that the words of these gentlemen should not "be taken at face value" as they "may have been designed for the record, to satisfy constituents in that election year." (EL. 30n.) The Government makes no such patently incredible contention. By the subtle use of inverted argument the Government attempts to picture Mr. Harrington as a man who had lost but who supported the motion to recommit because it was better than nothing at all. The Government's major premise is that the "job-freeze proposal" had been killed (apparently by the mere change in language effected in the Wadsworth motion to recommit.)⁶ On the basis of this assumption, the Government correctly quotes Mr. Harrington as stating that the language used in the motion to recommit was "designed to accomplish the purposes intended to be accomplished by the Harrington Amendment"; "with this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur"; and, "natural attrition will shortly have

⁶ The use of the term "job freeze proposal" here injects confusion into the argument. The question before the Court is not whether the modified language perpetuated the "strict job freeze" contained in the original language but whether it preserved employment protection, as distinguished from mere compensation protection, to all employees of carriers affected.

absorbed the employees that otherwise would be eliminated." (G. 35-56.)

There then follows this enigmatic sentence (G. 36):

"Although this statement undoubtedly claims that, under the substitute proposal, jobs would not be eliminated, it is notable that Congressman Harrington made no attempt to explain the difference in language between the two amendments, perhaps because he believed that compensatory protection unlimited as to time would, from the employee's standpoint, be as good as a job freeze."

This sentence admits, as it must, that in Harrington's view no jobs would be eliminated under the modified language but then rejects the statement because Harrington does not inform us why the words were changed. It is assumed gratuitously that he does not do so because unlimited compensatory protection would be as good as a "job freeze".

Despite the ingenuity of the peculiar logic employed by the Government, it does not obliterate reality. Harrington, Warren and Thomas said the modified language as contained in the Wadsworth motion meant the same thing as the original language.

The Government claims that "it was hardly in the interest of the proponents of the original Harrington Amendment to deprecate the substitute" (G. 35) but Harrington was not the moral coward which that statement and the incredible statement of the Erie-Lackawanna noted above would indicate. Harrington informed the House conferees that he was for the Wadsworth motion but that if they removed railroad abandonments from its purview he would vote against the Conference Report. The Conference Report re-

moved railroad abandonments from the coverage of the Act and Harrington had the moral courage to keep his word. 86 Cong. Rec. 10187, 10192.

To whom would the appellees have the Court resort in its efforts to determine the true intent and meaning of the term "worse position with respect to employment" in the second sentence of Section 5(2)(f)? Appellees expressly state that they would have the Court rely solely upon the fears and vague objections of the three most outspoken opponents of the Harrington Amendment in both its original and in its modified form. (G. 36-37, 39-40; EL. 11-12, 30, 32, 35-36.) That Mr. Lea had "fears and doubts" cannot be denied but, as this Court has said, "the fears and doubts of the opposition are no authoritative guide to the construction of legislation."

Mr. Lea twice stated his fear as to the effect of the modified language (A. 52-54) and Mr. Harrington, in explicit terms, told Mr. Lea that his conception of the language was wrong and that his fears were baseless. (A. 52-56.) Mr. Wolverton's objection was never clearly stated (A. 56) and Mr. Halleck was perhaps the only member of the House who thought the *original* language of the Harrington Amendment provided no more than compensation protection. (A. 79.)

The Second Conference Report is referred to by appellees as a compromise between the two opposing factions in the House. (G. 22, 42.) The opposing factions in the House comprised, on the one hand, of those who thought compensation protection was sufficient and; on the other hand, of those who thought

⁷ *Mastro Plastics Corp. et al. v. N.L.R.B.* and cases cited *supra*, p. 8.

such protection was not sufficient and who sought employment protection. This is confirmed in the brief of the Government (G. 27). Appellees, however, would have the Court believe that the "compromise" which resulted was one in which the proponents of employment protection gave all and received nothing. As a matter of fact, the proponents of employment protection gave up a "strict job freeze" and accepted a more flexible type of employment protection limited in duration to four years. In view of this, Section 5(2)(f) as it now stands reflects a true compromise between the opposing factions in the House, but the "compromise" suggested by the Government does not even meet the definition of the term. In the Government's view the employment protection proponents "compromised" by abject surrender.

There are many additional subtle arguments advanced by the appellees in their briefs regarding the legislative history of this provision. Time simply does not permit a review of these arguments. However, appellants are quite ready and willing to submit a memorandum covering all such arguments at a later date should the Court so desire.⁸

IV

The Decisions of This Court

The appellees attempt to dismiss the applicability of this Court's interpretation of Section 5(2)(f) in *Railway Labor Executives' Association v. United States*,

⁸ The press of time required by the receipt of the printed briefs of Erie-Lackawanna and the Government on Thursday and Friday, March 23 and 24 respectively, together with the necessity for submission of this reply brief to the printer in order that it may be filed with the Court by Monday morning, March 27, necessitates a very brief review of the remaining divisions of appellees' briefs.

339 U.S. 142, by asserting that two changes were made in the Harrington Amendment rather than the one (time limit) specified by the Court in its decision in *RLEA v. U.S.*, *supra*. The first change, according to the Government, was one of substance—the substitution of the words “in a worse position with respect to their employment” for the words “if such transaction will result in unemployment or displacement of employees.” (G. 46.)⁹ The second change was the time placed upon the operation of the Harrington Amendment and it is this latter change, according to the Government, to which this Court referred in the *RLEA* case. This argument, of course, ignores the fact that the language change in the Harrington Amendment did not change the substance of that Amendment. The fact that the Court referred to the language change as “not now material” (339 U.S. at 152; G. 47) is consistent with the narrow issue in the *RLEA* case for there the Court was not concerned with the *type* of protection required during the first four years but only with the protection intended to be afforded subsequent to the expiration of the four-year period.

With regard to this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U.S. 330, the Government dismisses this Court's reference to Section 5(2)(f) in that case by stating that in quoting only the second sentence of Section 5(2)(f) this Court was really referring to the

⁹ As pointed out in the preceding section, this change did not affect “the purposes intended to be accomplished by the [original language of the] Harrington Amendment.”

authority granted by the *third* sentence of this provision (G. 48-49).¹⁰

V

Claim of Contemporaneous and Consistent Construction of Section 5(2)(f)

A careful reading of the magazine excerpts and the comments of two attorneys referred to by appellees (G. 51-54; EL. 39-40), demonstrates that only one and perhaps two of them support the position of appellees and one of those refers to the protection provided as "dismissal wage" protection. (G. 52.) Such a characterization was explicitly branded as erroneous by Mr. Harrington himself and Brotherhood of Railroad Trainmen President Whitney in his letter to Mr. Lea (A. 55). The statement which is attributed to two attorneys for the Brotherhood of Locomotive Firemen and Enginemen which spoke of the "legal right to be compensated in large measure for the losses resulting from consolidation" (G. 52) is too general to offer any support for the Government's contention.

In any event, all statements quoted by the Government are statements of advocates of the protection afforded by the first sentence of Section 5(2)(f) and they quite understandably desired to inform their members of the considerable victory which they had achieved.

Several cases are cited and briefs of RLEA counsel are referred to and quoted at length (G. 54-61). None

¹⁰ The Government relies upon the dissenting opinion in the *ORT* case which states that "nothing in [Section 5(2)(f)] authorizes the Commission to freeze jobs" but at the same time points out that the Commission did in fact freeze jobs in at least one case. (G. 67n; G. 3a.)

of the situations referred to is applicable here. *Fort Worth & D. C. Ry. Co. Lease*, 247 ICC 119 (1941), involved a transaction which arose long prior to the development of any specific type of protection under Section 5(2)(f). The case, in fact, was quite similar to the situation which confronted this Court in *RLEA v. U.S.*, *supra*. In the *Fort Worth* case the major changes involved were to occur *after* the four-year period had expired. The railroad took the position, later taken by the ICC in *RLEA v. U.S.*, *supra*, that protection under Section 5(2)(f) was limited to a maximum of four years and that the railroad need only keep all employees on during that time and thereafter would owe them nothing under the statute.

The *RLEA* argued that anyone affected after the four years had expired should get at least compensation protection. It also argued that the few employees who might be affected during the four-year period should get like protection. Such a position was required and justified because the *RLEA*, at that early date, was faced with a possible decision which might have effectively deprived the vast majority of employees of all protection.

In any event, the ICC denied the application and thereby made no construction of the statute.¹¹

The decision in *Baltimore & Ohio Railroad Company Operation*, 261 ICC 615 (1946), relied upon by the Government (G. 60-62), involved the protection of employees who though adversely affected themselves

¹¹ The dissent of Chairman Eastman (G. 58-59) is interesting in that it implies that the majority of the ICC might have tended to a conclusion that employment protection was indeed required but was limited to a maximum rather than a minimum of four years.

were not employees of a *carrier* affected and therefore the Commission would not protect them.

The quotation from the oral argument in that case (G. 61) revolved around the issue of whether the Commission should fix seniority rights in cases coming before it. It was obvious to the Commission that it should not become involved in such matters and the attorney for the employees agreed with this conclusion and then indicated that the employees would be willing to accept compensation protection.

The Government's review of the development of protective conditions by the Commission (G. 63-66) merely emphasizes what has heretofore been stated by appellants, that the conditions imposed were suggested by representatives of employees as the type of protection which they thought suitable to the transactions then before the Commission the type of protection which nearly all of them had fought for in Congress and which they had become accustomed to under the Washington Agreement.

The review of all Commission decisions under Section 5(2)(f) as submitted by the appellees clearly demonstrates that while the Commission has followed a particular practice with regard to the type of conditions it has imposed it has expressed no positive construction of this statute regarding its mandate to impose employment protection. The most that can be said regarding the Commission's "construction" of this mandate is that the Commission has acted negatively in this matter for twenty years. It has perhaps "considered" Section 5(2)(f) as not providing employment protection but had never so held. In this regard it falls within the rule recently announced by

this Court in *Baltimore & Ohio Railway Company v. Jackson*, 353 U. S. 325 at 330-331. (1957):

"It is contended that, since the Commission has for over 60 years considered maintenance-of-way vehicles not subject to the Acts, this consistent administrative interpretation is persuasive evidence that the Congress never intended to include them within its coverage. It is true that long administrative practice is entitled to weight, *Davis v. Manry*, 266 US 401, 405, 45 S Ct 163, 69 L ed 350, 352 (1925), but there has been no expressed administrative determination of the problem. We believe petitioner overspeaks in elevating negative action to positive administrative decision. In our view the failure of the Commission to act is not a binding administrative interpretation that Congress did not intend these cars to come within the purview of the Acts. See *Shields v. Atlantic Coast Line R. Co.* 350 US 318, 321, 322, 76 S Ct 386, 100 L ed 364, 367, 368 (1956)."

VI.

Inadequacy of "New Orleans Conditions"

The appellees take the position that the evidence submitted by Mr. Crotty injected a new factual element into the case which was not presented to the Commission and therefore should not be considered by this Court (G. 67; EL 53). The appellants, however, submitted that testimony of Mr. Crotty in support of the temporary restraining order which they sought from the District Court and which they believe to be a necessary basis for the permanent injunction which they here seek (A. 85). The testimony was offered in amplification of evidence of employee adverse effect submitted to the Commission by the railroad (A. 85). The Commission, after applying the "New Orleans conditions" for 10 years hardly can be heard to say at

this time that it was not cognizant of the effects of the application of those conditions. The testimony of Mr. Crotty merely details for the Court those effects.

The reference to the "New Orleans conditions" as "providing partial financial compensation" does not constitute the injection of a new factual issue as claimed by the appellees (G. 67; EL. 53) since the railroad and the Commission both have had long experience with the application of these conditions and must recognize that they do not provide full financial compensation to employees whose position with respect to their employment is worsened as a result of the merger. (Cf. A. 20-24.)

It is suggested by the Government that imposition of employment protection conditions would "impede the effective consummation of mergers" (G. 70). No doubt the full benefits of a merger may be partially and temporarily postponed as the result of the imposition of such conditions, but that is a recognized effect of the imposition of any type of protective conditions and has never been considered a justifiable reason for refusing to impose conditions (A. 25). In addition, the recent merger of the Norfolk & Western Railway Company and the Virginian Railway Company certainly was not "impeded" by employment protection, for prior to that merger those railroads executed a voluntary agreement with the representatives of their employees which provided for those employees almost the precise type of protection appellants seek here. Further, that agreement contains no time limit on the employment protection which it provides.

Though the Erie-Lackawanna claims that the "New Orleans conditions" are adequate, it offers certain

"undertakings" with regard to the protection of its employees in this case (EL. 53-57). Such "undertakings" are not only totally irrelevant to the issue presented to this Court and are, in fact, meaningless to the railroad employment force as a whole but also point up the fact that the "New Orleans conditions" do not provide even complete financial protection and do not meet the requirements of Section 5(2)(f) as recognized by the Government (G. 11).¹²

CONCLUSION

Although it has not been possible to present fully the errors contained in the briefs of appellees, the appellants respectfully submit that the foregoing is sufficient to demonstrate that the judgment and order of the District Court is erroneous and should be reversed with directions to set aside as contrary to law that part of the Commission's report and order of September 13, 1960, which holds that it is not required by statute to protect the employment position of all employees involved; to direct the Commission to take such action as will provide employment protection consistent with the requirements of Section 5(2)(f), and to issue a permanent injunction based upon the temporary restraining order now in effect which will remain effective until such time as the Commission

¹² In the course of the railroad's presentation of its "undertakings" it makes the statement that the "New Orleans conditions" "do not cause loss of seniority rights or 'bumping'." (EL. 54.) This statement is true as far as it goes but the "New Orleans conditions" require "bumping" to take place before they become operative (A. 22).

has complied with those requirements of Section 5(2)(f).

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
ET AL., *Appellants*

v.

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PETITION FOR REHEARING

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

Appeal from the United States District Court for the
Eastern District of Michigan

PETITION FOR REHEARING

The Brotherhood of Maintenance of Way Employees and the Railway Labor Executives' Association, petitioners herein, present this petition for a rehearing and, in support thereof, respectfully show:

The Majority Opinion Treats Only of the Legislative History of the Second Sentence of Section 5(2)(f) and Does Not Consider That Sentence From the Aspect of Its Plain Language Which Precludes Resort to Legislative History or If Such History is Relied Upon Must Contain a "Clear Showing" That Something Other Than Employment Was Meant by the Word "Employment" as Used in the Phrase "Worse Position With Respect to Their Employment."

The majority opinion does not discuss the meaning of the plain language of the second sentence of Section 5(2)(f).

There is nothing in subparagraph (f) or Section 5 or the entire Interstate Commerce Act which would indicate that the term "employment" was inserted by Congress in subparagraph (f) as a special term of art and should therefore be understood in any sense other than that which is ordinarily and usually attributed to it. See *Caminetti v. United States*, 242 U.S. 470, 485-486, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

This Court has reiterated on innumerable occasions the fundamental rule of statutory construction that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant." (Emphasis supplied). *United States v. First National Bank*, 234 U.S. 245, 258, 34 S. Ct. 846, 58 L. Ed. 1298. See also *Western Union Teleg. Co. v. Lenroot*, 323 U.S. 490, 65 S. Ct. 568, 76 L. Ed. 1128; *Southern R. Co. v. United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Columbia Water Power Co. v. Columbia Elec. Street R. L. & P. Co.*, 172 U.S. 475, 19 S. Ct. 247, 43 L. Ed. 521. The "natural and usual signification" of the term "employment" is the "state of being employed." Webster's New Collegiate Dictionary, 2nd Ed. The first

sentence grants compensation protection based upon the provisions of the Washington Agreement and that is the only protection that has ever been afforded employees under Section 5(2)(f) by the Commission. Therefore, the second sentence becomes meaningless if it does not provide employment protection.

In addition, the application of protection to employees is treated by Congress in the second sentence of Section 5(2)(f) in a manner significantly different than that in which the application of such protection is treated in the first sentence of that provision.

The first sentence of Section 5(2)(f) clearly contemplates that employees will be adversely affected *before* the "fair and equitable arrangement" will be applied to them. That sentence is designed to protect the "interests of the railroad employees affected."

But the second sentence does not contemplate an employee being placed "in a worse position with respect to his employment" before *its* protection is applied to him. The authors of that provision made a significant change in referring to employees in the first and second sentences—while the first sentence refers to "employees affected" the second sentence refers to "employees of carriers affected". In other words, under the second sentence it was contemplated that no employee would be affected within the meaning of the Act and that all employees of *carriers* affected must be kept "in no worse position with respect to their employment." Congress clearly intended no harm (with respect to employment) to be visited upon the employees of carriers affected by its orders.

This significant difference in treatment between the first and second sentences of 5(2)(f) with regard to

the term "affected" strongly indicates that in the first sentence the use of the term "railroad employees affected" intended compensation protection and in the second sentence the use of the term "employees of carriers affected" intended employment protection.

II.

The Majority Opinion, in Considering the Legislative History of Section 5(2)(f), Overlooks the Clear and Precise Explanation of the Meaning of the Term "Worse Position With Respect to Their Employment" as Presented by the Author and the Proponents of That Term as Well as the Official Explanation of the Term Placed in the Congressional Record by the Senate Sponsor of the Legislation Which Contains That Term and Thus Appears to Depart From the Longstanding Rule of This Court That the "Fears and Doubts of the Opposition Are No Authoritative Guide to the Construction of Legislation. It is the Sponsors That We Look to When the Meaning of Statutory Words is in Doubt."

At pages 6-7 and 8 of the majority slip opinion, it is stated:

"Secondly, the representatives whose floor statements are entitled to the greatest weight are those House members who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise. Finally, although it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not 'job freeze', was contemplated."

"However, were we to agree [with appellants' position]; it would be necessary to say that a substantial change in phraseology was made for no purpose and to disregard the statements of those House members most intimately connected with the final version of the statute."

The author of the specific phase in issue here—"worse position with respect to their employment"—clearly informed the House of Representatives what that phrase meant. His statement was not only clear and precise but was unchallenged by any member of the House:

"The motion to recommit, which will shortly be made by . . . [Mr. Wadsworth], will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, *with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment.* . . .

"The labor protective provision, which so many of us favor, is beneficial to all railroad employees. It protects the public against the slow death and the withering of entire communities, that always accompanies railroad consolidations. It is good for the railroad industry, because it will stay the hand of railroad financial interests which, instead of squeezing the water out of the capitalization of that industry, are bent upon reducing the physical plant of our great railroads, so necessary in time of war or in time of peace and prosperity . . . *By adoption of this provision in the transportation bill the government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers.* But this provision also contains a clause that permits the industry, through the process of collective bar-

gaining, to work out its problems in a democratic manner.

“Without this labor protective provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. *With this provision, these younger men will be spared that fate, and job eliminations will come gradually from the other end of the seniority list, as deaths, resignations and retirements occur.* If S. 2009 will bring to the railroad industry the prosperity its supporters contend for it, then *the natural attrition will shortly have absorbed the employees that otherwise would be eliminated* if this Congress does not now deal with this problem.” (Emphasis supplied.)

Further, this clear explanation of the meaning of the governing phase was confirmed by every member of the House who spoke in support of its inclusion in the pending legislation.² Indeed, when Representative Warren spoke in support of this provision his remarks were greeted with applause by the members of the House.

The statements of the House conferees relied upon in the majority opinion certainly do not provide the “clear showing” that something other than employment protection was meant by the phrase at issue³ and, in any event, all such statements fall within the pale of the rule repeatedly pronounced by this Court that

¹ 86 Cong. Rec. 5871.

² 86 Cong. Rec. 5867-5868, 5883, 5884.

³ See dissenting opinion, pp. 5-7.

the "fears and doubts of the opposition are no authoritative guide to the construction of legislation".⁴

It is respectfully submitted that no member of the House was more "intimately connected" with the phrase "worse position with respect to their employment" than was Mr. Harrington and that phrase appears *unchanged* in the final version of the statute.

The change in phraseology accomplished by the Wadsworth motion to recommit was made for a purpose and accomplished that purpose. It eliminated the prohibition against displacement which was contained in the original language of the Harrington Amendment but, according to Harrington himself and all who spoke in its support, that phrase did not eliminate employment protection.

The majority opinion states that the representatives "whose floor statements are entitled to the greatest weight are those who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise." The legislator whose word is entitled to at least as great weight as that of Representative Lea is Senator Wheeler who sponsored the Transportation Act of 1940 in the Senate. After the Senate had adopted the Conference Report containing the phrase "no worse position with respect to their employment", Senator Wheeler asked and was

⁴ *Mastro Plastics Corp. et al. v. N.L.R.B.*, 350 U.S. 270, 288n, 76 S. Ct. 349, 100 L. Ed. 306; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 387, 71 S. Ct. 745, 95 L. Ed. 1035; see also *S. H. Camp & Co. v. N.L.R.B.* (6th Cir.), 160 F. 2d 519, 521 and cases cited therein.

granted unanimous consent to place in the *Congressional Record* a written document which explained certain provisions of the Transportation Act which had been changed in the bill as originally passed by the Senate. With regard to Section 5(2) (f), this explanatory statement simply read:⁵

"Present law is also amended *by inclusion of the Harrington Amendment*, protecting employees in the event of consolidations . . ." (Emphasis supplied)

It is respectfully submitted that this document of explanation placed in the *Record* by the Senate sponsor of the Transportation Act overcomes any clouds which might have been placed upon the meaning of the phrase "worse position with respect to their employment" by Congressman Lea. To state that Section 5(2) (f) contains the Harrington Amendment certainly is to say that that amendment contains the protection for employees which Representative Harrington and its proponents intended it to contain and stated that it did contain. If it is claimed employment protection was deleted by the Second Conference Report it must be claimed that it was deleted merely by limiting the operation of the phrase "worse position with respect to their employment" to four years, and if that type of protection was deleted certainly what was left, if anything, could not have been and would not had been called the "Harrington Amendment" in a document which was intended to convey to the Commission the *meaning* of the various provisions of the Transportation Act of 1940.

Indeed, if Congress, in the second sentence of Section 5(2) (f), did *not* provide employment protection, the

⁵ 86 Cong. Rec., P. 10, 76th Cong., 3rd Sess., p. 11768.

thrice evidenced will of the House to provide such protection was rendered futile.⁶

III.

The Majority Opinion Indicates That Congress Performed a Futile Act in Enacting the Second Sentence of Section 5(2)(f).

At page 5 of the majority slip opinion, it is stated that the report of the "Committee of Six" which became the first sentence of Section 5(2)(f) "urged codification of the Washington Agreement and a bill drafted along those lines, S. 2009, was passed by the Senate in 1939." At footnote 1 on page 2 of the majority slip opinion, there is contained a brief explanation of the protection afforded by the so-called New Orleans conditions. These conditions provide little or no more protection than is provided by the Washington Agreement and any modifications of that Agreement found in the New Orleans conditions could have readily been made by the Commission under the "fair and equitable" clause of the first sentence of Section 5(2)(f). The protection afforded employees under the New Orleans conditions is substantially identical to that afforded them under the Washington Agreement and the second sentence of Section 5(2)(f) provides no advantages of substance which would not have been afforded by the application of the Washington Agree-

⁶ On three occasions the House voted to provide employment protection: First, when it enacted the Harrington Amendment in its original form; second, when 275 members of the House petitioned the conferees during the first conference to retain the Harrington Amendment in its original form; and, third, when it voted to recommit the first conference report with the words "worse position with respect to their employment" which the author and proponents of those words explained as providing employment protection, and their explanations were not challenged.

ment under the first sentence of Section 5(2)(f). Therefore, the Congress accomplished nothing by its use of the term "worse position with respect to their employment." Cf. *United States v. Lexington Mill & E. Co.*, 232 U.S. 399, 409-410.

IV.

The Majority Opinion Indicates, By Its Reliance Upon the Failure of the Commission to Impose Employment Protective Conditions Subsequent to the Passage of Section 5 (2)(f), That the Majority Has Departed from the Rule Recently Announced By This Court in *Baltimore and Ohio Railway Company v. Jackson*, 353 U.S. 325.

At pages 9 and 11 of the majority slip opinion, it is stated:

"The Commission has consistently followed this practice to date in over 80 cases, * * *.

* * * *

"In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, * * *."

In the *Jackson* case, the Commission relied upon its refusal to interpret the Safety Appliance Acts (45 U.S.C. §§ 1 et seq.) as applicable to maintenance of way vehicles. In the words of the dissenting opinion in that case the "inapplicability of the Safety Appliance Acts to maintenance-of-way vehicles is confirmed by the long-standing administrative interpretation of the Interstate Commerce Commission and by numerous practical considerations. The Interstate Commerce Commission has administered these Acts for over half a century. During that time, it has, by its own statement, 'never considered the small maintenance of way vehicles subject to those Acts' Its order of March

13, 1911, specifying the number, dimensions and location of the appliances required by the Acts, omits all mention of motor track cars and push trucks." (353 U.S. at 341.) Continuing, the dissenting opinion states that this disclaimer by the Commission of the application of the Acts is all the more impressive because those Acts "impose an affirmative duty on the Commission to enforce their provisions." (353 U.S. at 342.)

The dissenting opinion in the *Jackson* case also concluded, similarly to the conclusion reached in the majority opinion in this case, that it was "significant that the Brotherhood of Maintenance of Way Employees, whose members operate and maintain motor cars in their work, never has contended that the Safety Appliance Acts apply to these vehicles. However, the Brotherhood has been active in soliciting other legislation which it feels would add to the safety of its members. * * * This state legislation [secured through the efforts of the Brotherhood] dealing expressly with the safety requirements of motor track cars indicates that the Federal Acts have not been thought to apply to them." (353 U.S. 343-344.)

The situation confronting this Court in the *Jackson* case, insofar as the rule of administrative interpretation and the attitude of the Brotherhood is concerned, was precisely the same as that which confronts this Court in this case, but in the *Jackson* case the Court held:

"It is contended that, since the Commission has for over 60 years considered maintenance-of-way vehicles not subject to the Acts, this consistent administrative interpretation is persuasive evidence that the Congress never intended to include them within its coverage. It is true that long administrative practice is entitled to weight. *Davis v. Manry*, 266 US 401, 405, 45 S Ct 163, 69 L ed

350, 352 (1925), but there has been no expressed administrative determination of the problem. We believe petitioner overspeaks in elevating negative action to positive administrative decision. In our view the failure of the Commission to act is not a binding administrative interpretation that Congress did not intend these cars to come within the purview of the Acts. See *Shields v. Atlantic Coast Line R. Co.*, 350 US 318, 321, 322, 76 S Ct 386, 100 L ed 364, 367, 368 (1956)."

V.

It Is Respectfully Submitted That the Majority Opinion Errs in Relying Upon the Memorandum Brief Submitted by the Railway Labor Executives' Association in a Case Decided in June, 1941, Finance Docket No. 12460, *Ft. Worth & D. C. R. Co. Lease*, 247 ICC 119, Because in That Case, in the Words of the Majority Opinion (Slip Opinion, p. 9), "the RLEA Argued at Length That § 5(2)(f) Did Not Impose a Mandatory Job Freeze Requirement—Compensatory Conditions Would Be Satisfactory."

The RLEA's position in that case should not be relied upon in support of a finding that Section 5(2)(f) requires only compensation protection any more than should the carrier's position in that case be relied upon to support a finding that employment protection was intended to be provided by Section 5(2)(f). In fact, the railroad in that case argued that a job freeze was intended by the second sentence of Section 5(2)(f) for a period of four years from the date of the Commission's order and that no protection could be provided beyond four years. The *Ft. Worth* case involved a transaction which arose and was originally decided prior to the enactment of the Transportation Act of 1940. On October 7, 1940, the Commission permitted the applicant to file an amendment to its application under the newly enacted provisions of Section 5(2).

On December 2 and 3, 1940, briefs were filed and the case was submitted to the Commission in February 1941. In that case, the major changes proposed by the applicant would have occurred *after* the four-year protective period provided in Section 5(2)(f) had expired. The railroad took the position which was later taken by the Commission and rejected by this Court in *Railway Labor Executives' Association v. United States*, 339 U.S. 142, that the protection provided by Section 5(2)(f) was limited to a maximum of four years. The railroad contended that it need only keep the employees on during that four-year period and thereafter would owe them nothing under the statute.

The RLEA was confronted with a possible interpretation which would limit the protection afforded under the Washington Agreement and theretofore provided by the Commission, argued that anyone affected after the four-year period had expired should be provided at least compensation protection. It also argued that the few employees who might be affected during the four-year period should get similar protection. Such a position was required and justified because the RLEA, at that early date, was faced with a possible decision which might have effectively deprived the vast majority of employees of all protection.

The Commission denied the application and thereby made no construction of the statute. However, it is significant that the dissent of Chairman Eastman (247 ICC at 132) implies that had the majority of the Commission approved that application it might have tended to the conclusion that employment protection rather than compensation protection was indeed re-

quired by the statute but that it was limited to a maximum rather than a minimum of four years.

VI.

The Majority Opinion Misconstrues Appellants' Reliance Upon *RLEA v. United States*, 339 U.S. 142, as Based Upon "Only One Change" Having Been Made in the Harrington Amendment.

At page 10 of the majority slip opinion, it is stated:

"Appellants point to passages in the opinion, 339 U.S., at 151-154, in which, they assert, the Court recognized that only *one* change—the four-year limitation—was blended into the Harrington amendment between origination and final approval. However, this contention ignores the plain recognition of the Court, revealed on page 152 of the opinion, that two changes occurred, one of which being the alteration in language pertinent to the resolution of this case."

The recognition of a change in the Harrington Amendment at page 152 of this Court's opinion in the *RLEA* case is apparently a reference to the sentence on that page which reads: "The modification of the Harrington amendment is not now material." The appellants have never contended that the original language of the Harrington Amendment was not altered. They do contend, however, that the alteration produced no change of substance and rely upon the opinion of this Court in the *RLEA* case when, after stating that the modification on recommitment of the Harrington Amendment was not material, stated that the Second Conference Report contained a "substantial change in the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval." (339 U.S. at 153.) The

appellants further rely upon the statement in this Court's opinion in the *RLEA* case in which it states:

"The second sentence thus gave a limited scope to the Harrington amendment and made it workable by putting a time limit upon its otherwise prohibitory effect."

It is respectfully submitted that the opinion in the *RLEA* case, while it recognizes that two changes were made in the Harrington Amendment, also recognized that there was but one change of *substance* and that change did not effect a change in the *type* of protection afforded by the Harrington Amendment but ~~only~~ upon the length of time that such protection would be required to be provided. The above-quoted excerpt from this Court's opinion in the *RLEA* case is relied upon as recognition by this Court that the Harrington Amendment provided employment protection for a limited period and it is respectfully submitted that appellants are supported in their reliance upon this language by the dissenting opinion in *The Order of Railroad Telegraphers, et al. v. Chicago and North Western R. Co.*, 362 U.S. 330, which quoted this language as recognizing a requirement of employment protection and expressed disagreement with it (362 U.S. at 356-357.)

The reference by the dissenting opinion in the *ORT* case to the *RLEA* opinion was elicited as a result of the majority opinion's statement that Section 5(2)(f) requires the Commission to include " 'terms and conditions' which provide that for a term of years after a consolidation employees should not be 'in a worse position with respect to their employment' *than they would otherwise have been.*" (Emphasis supplied.)

It is respectfully submitted by petitioners that the emphasized portion of the above-quoted excerpt from this Court's opinion while it may not constitute a discussion of the present problem clearly indicates that the second sentence of Section 5(2)(f) requires that for a period of four years 'an employee shall be in the same position regarding his employment as he would have been had no merger, etc., taken place. It is respectfully submitted that such is the only interpretation which can be placed upon this language and that if this language does not mean that employment shall be protected, it means nothing.'

VII.

It Is Respectfully Submitted That the Majority Opinion Errs in Citing *City of Nashville v. United States*, 355 U.S. 63, as a Case in Which the Commission Imposed Less Comprehensive Employee Conditions Than Those Imposed in the Instant Case.

At page 9, footnote 9 of the majority slip opinion, it is stated:

"It is noteworthy that this Court has recently affirmed a case in which the Commission imposed less comprehensive conditions than those in this case. *City of Nashville v. United States*, 355 U.S. 63."

The conditions imposed in the case referred to in the majority opinion are the *identical* conditions imposed in this case. The decision of the Commission in that case is unreported, but can be found in Commission Finance Docket No. 18845, decided March 1, 1957. At

¹ Cf. dissenting slip opinion, p. 7, wherein it is stated that "in a realistic sense a man without a job is 'in a worse position with respect to' his 'employment', though he receives some compensation for doing nothing."

Sheet 65 of the Commission's opinion in that case there is the following statement with regard to the protection imposed for employees:

"Under the circumstances, we will impose the same conditions for the protection of railway employees who may be adversely affected as were set forth in *New Orleans Union Passenger Terminal Case*, 282 ICC 271."

VIII.

It Is Respectfully Submitted That the Majority Opinion Errs in Upholding the District Court's Consideration of Certain Brotherhood Publications on the Ground That Appellants Raised No Objections Below.

At page 9, footnote 8 of the majority slip opinion, it is stated:

"It is clear that the District Court did not err in taking cognizance of these publications, particularly since appellants raised no objections below. Cf. *Texas & Pacific R. Co. v. Pottorff*, 291 U. S. 245, 254."

The excerpts from the publications referred to in the majority opinion were never offered in evidence by the appellees in this proceeding but were quoted in appellees' briefs to the District Court. Since such material was never offered in evidence, it could not have been objected to by appellants.

IX.

It Is Respectfully Submitted That the Majority Opinion Errs in Indicating That Appellants Relied Upon "Unexplained Opposition" and Then Apparently Considers as Significant the Fact That Representatives Harrington, Warren and Thomas Voted Against the Final Version of Section 5(2)(f).

Appellants do not rely upon unexplained opposition. The opposition to the Harrington Amendment was explained by Mr. Lea. Mr. Lea was told on two occasions that the fears which he had as to the effect of the term "worse position with respect to their employment" was baseless and erroneous.⁸

The apparent reliance of the majority opinion upon the fact that Representatives Harrington, Warren and Thomas voted against the final version of the bill certainly does not constitute "unexplained opposition" by Mr. Harrington. The Congressional Record clearly shows that Representative Harrington voted against the final version of the bill only because the conferees had eliminated railroad abandonments from its purview.⁹ 86 Cong. Rec. 10187, 10192. See dissenting ship opinion, p. 5, footnote 10.

⁸ 86 Cong. Rec. 5870, 5871.

⁹ Since the term "worse position with respect to their employment" was not altered by the conferees the most that could be assumed as the motive underlying the votes of Representatives Warren and Thomas, was that they objected to the protection afforded by that phrase being limited to four years.

X.

It Is Respectfully Submitted That the Majority Opinion Errs in Dismissing the Appellants' Objection Regarding the Refusal of the Lower Court to Consider Certain Testimony Concerning the Adequacy of the Conditions on the Ground That the Lower Court Did Not Refuse to Accept Appellants' Proof But Refrained From Ruling on the Matter and the Appellants Never Renewed Their Efforts.

At page 3, footnote 2 of the majority slip opinion, it is stated:

"In this connection, it should be noted that appellants have contended that the lower court erred when it refused to accept certain testimony concerning the adequacy of the conditions. The short answer to this is that the court did not refuse to accept appellants' proof; the court explicitly refrained from ruling on the matter when the offer was made and appellants never renewed their efforts. See R. 179."

The page of the record cited in the majority opinion shows that the court below did, in fact, refuse to consider the testimony offered and prevented appellants from "renewing their efforts" to offer it. The testimony was offered and the court through Judge O'Sullivan said (R. 179):

"If we conclude that it is proper for us to give any attention to the testimony offered before Judge Thornton, we will advise the respondents and give them, which I think would be only fair, the right to meet any part of that testimony by their evidence."

The statement of Judge O'Sullivan and the opinion thereafter rendered by the court (R. 196-203) makes clear the fact that the court gave no attention to that testimony and the quoted ruling of the court effectively prevented appellants from pursuing the matter further.

XI.

It Is Respectfully Submitted That the Majority Opinion Erred in Relying Upon the Provisions of Section 222(f) of the Communications Act of 1943, 47 U.S.C. § 222(f), in Support of Its Conclusions.

At page 6, footnote 5 of the majority slip opinion, it is stated:

“As further evidence that Congress would have specified ‘job freeze’ had it meant ‘job freeze’ in the 1940 Act, compare the 1943 amendment to § 222(f) of the Communications Act, 47 U.S.C. § 222(f) . . .”

The legislative history of Section 222(f) emphasizes the fact that the employee protection provided in that Section protected employees from loss of employment for *any* reason and not merely loss of employment because of a merger. It was the extension of employment protection to loss of employment from any cause which elicited the discussion on the floor of the Senate.

The legislative history of Section 222(f) also confirms the fact that the Senate in 1943 knew just how far it had gone in providing employment protection by its enactment of the Harrington Amendment. A statement of Senator Hawks which was read by Senator Taft on the floor of the Senate during the debate on Section 222(f) points this out. Senator Hawk's statement as read by Senator Taft is as follows:¹⁰

“The provision protecting employees of any merged company that occurs under this act should not be any *more* exacting on the merged companies than the provisions contained in the amendment of 1940 to the Interstate Commerce Act authorizing the consolidation and merger of railroads. The

¹⁰ 89 Cong. Rec., Part 1, 78th Cong., 1st Sess., p. 1195.

merged company should not be compelled to keep employees, who *under ordinary conditions*, could be dismissed by either of the companies merging. The purpose of the act should be to protect only employees who might be discharged as the result of the merger itself. . . . I do not believe the protection should go to the point of *guaranteeing employment* to those who would have been released in any event *regardless* of the merger." (Emphasis supplied.)

Section 5(2)(f) did not protect employees from being discharged under "ordinary conditions" and, in the opinion of Senator Hawks and others, neither should the Communications Act of 1943. If anyone opposing the employee protection feature of the 1943 Act had for a moment believed that Section 5(2)(f) did not protect employees from furloughs or dismissals resulting from the merger it seems reasonable to assume that they would have used that view to oppose the type of provision with which they were faced. It is of significance that they did not.

CONCLUSION

Your petitioners respectfully represent that the majority opinion gives no effect to or departs from this Court's rules that the "natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of a clear showing that something else was meant"; that the "fears and doubts of the opposition are no authoritative guide to the construction of legislation but it is to the sponsors that the Court looks when the meaning of statutory words is in doubt"; that "all words used in a statute should be given their proper signification and effect"; and that "negative action is not to be considered a binding administrative interpretation".

Your petitioners also respectfully represent that the majority opinion errs in finding that the conditions imposed by the Commission in the *Louisville & Nashville Merger* case were less comprehensive than those imposed in this case; that the appellants could have raised objection to the consideration by the District Court of publications relied upon by that court; and that appellants had the opportunity to renew their efforts to secure consideration by the District Court of certain testimony concerning the adequacy of the conditions imposed.

Your petitioners therefore respectfully submit that rehearing should be granted to give effect to these rules of this Court upon the issues in this case and to permit your petitioners to present to the Court their bases for the modification of the majority opinion in accordance with the circumstances surrounding the consideration by the court below of extra-record facts and refusal

by the court below to consider certain sworn testimony placed before it.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, William Grattan Mahoney, one of the counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM GRATTAN MAHONEY
One of the Counsel for Petitioners

SUPREME COURT OF THE UNITED STATES

No. 681.—OCTOBER TERM, 1960.

Brotherhood of Maintenance of Way Employees, et al., Appel- lants,	} On Appeal From the United States Dis- trict Court for the Eastern District of Michigan.
United States, et al.	

[May 1, 1961.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The dispute in this case commenced when the Delaware, Lackawanna & Western Railroad Co. and the Erie Railroad Co. filed a joint application for approval by the Interstate Commerce Commission of a proposed merger, the surviving company to be known as the Erie-Lackawanna Railroad Co. Supervision by the Commission of railroad mergers is required by § 5 (2) of the Interstate Commerce Act, 54 Stat. 905, 49 U. S. C. § 5 (2), and the statute directs the Commission to authorize such transactions as it finds will be "consistent with the public interest." The Commission concluded in this case that the public interest would be served by a merger of the two applicants and that finding has not been questioned. The point in issue is whether the conditions attached to the merger for the protection of the employees of the two roads satisfy the congressional mandate embodied in § 5 (2)(f) of the Act which provides in relevant part that:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equi-

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table arrangement to protect the interests of the railroad employees affected. *In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was an employee of such carrier or carriers prior to the effective date of such order.*" (Emphasis added.)

Before the Commission's hearing examiner, the railroads suggested that the "New Orleans" conditions be imposed in satisfaction of § 5 (2) (f). These conditions derive their name and substance from the Commission's decision in the *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271, and they provide compensation benefits for employees displaced or discharged as a result of a merger.¹ After the hearing had concluded, however, appellant Railway Labor Executives' Association (RLEA) filed a brief with the examiner claiming that compensatory conditions were not enough since, in its

¹ Briefly, the New Orleans conditions prescribe the following: employees retained on the job but in a lower paying position get the difference between the two salaries for four years following the merger; discharged employees get their old salaries for four years, less whatever they make in other jobs, or they may elect a lump sum payment; transferred employees get certain moving expenses, and certain fringe benefits are insured; and any additional benefits that a given employee would have received under the Washington Job Protection Agreement, discussed in the text *infra*, are guaranteed.

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view, the second sentence of § 5 (2)(f) imposes a minimum requirement that no employee be discharged for at least the length of his prior service up to four years following consummation of the merger. The hearing examiner did not agree with the RLEA's reading of § 5 (2)(f) and recommended the New Orleans conditions to the Commission, a recommendation which the Commission unanimously adopted. 312 I. C. C. 185. Appellants then instituted proceedings in the United States District Court of Michigan, seeking to enjoin the Commission's order approving the merger. A temporary restraining order issued following testimony by a representative of the RLEA that irreparable injury to the employees would otherwise ensue. However, after hearing the case on its merits, the District Court dissolved the restraining order and dismissed appellants' complaint. 189 F. Supp. 942. Direct appeal to this Court followed and we noted probable jurisdiction. 365 U. S. 809.

Preliminarily, it must be noted that the adequacy of the New Orleans' conditions is not an issue before this Court: Appellants did not challenge their sufficiency below, nor do they argue the point here.² Rather, appel-

² Appellants do relate certain objections to the adequacy of the conditions but it seems clear that these objections, which were not introduced before the Commission or the court below except at the hearing for temporary injunctive relief, have been included in appellants' brief only as background material. If appellants wish to challenge directly the adequacy of the conditions, it seems clear that they may still proceed to do so pursuant to § 5 (9) of the Act.

In this connection, it should be noted that appellants have contended that the lower court erred when it refused to accept certain testimony concerning the adequacy of the conditions. The short answer to this is that the court did not refuse to accept appellants' proof; the court explicitly refrained from ruling on the matter when the offer was made and appellants never renewed their efforts. See R. 179.

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lants' sole contention is that no compensation plan is adequate unless it is based on the premise that all the employees currently on the payroll remain in the surviving railroad's employ for at least the length of their previous employment up to four years. Appellants do not say that every employee must remain in his present job, but they do insist that some job must remain open for each one. We think, however, that a review of the background of § 5 (2) (f) and its subsequent interpretation demonstrates the defects in appellants' position.

Section 5 (2) (f), as it now appears, was enacted as part of the Transportation Act of 1940. A broad synopsis of the occurrences which led to the enactment of those sections on railroad consolidation of which § 5 (2) (f) is a part is contained in the Appendix to this Court's opinion in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U. S. 298, 315, and it is unnecessary to reproduce that material here except to note that: "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5 (2) (a) in its present form, was to facilitate merger and consolidation in the national transportation system." *County of Marin v. United States*, 356 U. S. 412, 416. The relevant events, for present purposes, date from 1933, when Congress passed the Emergency Railroad Transportation Act, 48 Stat. 211. That Act contemplated extensive railroad consolidations and provided for employee protection pursuant thereto in the following language:

"[N]or shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

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Shortly before the Emergency Act expired in 1936, a great majority of the Nation's railroads and brotherhoods entered into the Washington Job Protection Agreement,³ an industry-wide collective bargaining agreement which also specified conditions for the protection of employees in the event of mergers. Unlike the Emergency Act, however, the Washington Agreement provided for compensatory protection rather than the "job freeze" previously prescribed. Subsequently, efforts commenced to re-evaluate the law relating to railroad consolidations and a "Committee of Six" was appointed by the President to study the matter. Those portions of the Committee's final report pertaining to employee protection urged codification of the Washington Agreement⁴ and a bill drafted along those lines, S. 2009, was passed by the Senate in 1939. 84 Cong. Rec. 6158. The Senate bill contained language identical to that now found in the first sentence of § 5 (2) (f) — i. e., the transaction should contain "fair and equitable" conditions.

A bill similar in this respect to S. 2009 was introduced in the House but, before it was sent to the Conference Committee, Representative Harrington inserted an amendment which added a second sentence to the one contained in the original version, this sentence stating that:

"[N]o such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882.

³ A discussion of this agreement and its terms is found in *United States v. Lo v den*, 308 U. S. 225.

⁴ See Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531 and H. R. 4862, 76th Cong., 1st Sess. 216-217, 275.

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The bill came out of the Conference Committee without Representative Harrington's addendum and, dissatisfaction having been expressed by Representative Harrington and others, a motion to recommit was passed by the House. This motion required that the language of the original House bill be restored "but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment" should speak as the second sentence of § 5 (2) (f) now does—*viz.*, "[the] transactions will not result in employees of said carriers . . . being in a worse position with regard to employment." 86 Cong. Rec. 5886. This new phraseology was adopted by the Conference Committee, with the added limitation that such protection need extend no more than four years, and the bill passed without further relevant alteration. 86 Cong. Rec. 10193, 11766.

It would not be productive to relate in detail the various statements offered by members of the House to explain the significance of the events outlined above. It is enough to say that they were many, sometimes ambiguous and often conflicting. However, certain points can be made with confidence. First, it is clear that there were two alterations made in the substance of the original Harrington amendment: Not only was a four-year limitation imposed, but also general language of imprecise import was used in substitute for language clearly requiring "job freeze" such as appeared in the original amendment and the 1933 Act.⁵ Secondly, the representatives

⁵ As further evidence that Congress would have specified "job freeze" had it meant "job freeze" in the 1940 Act, compare the 1943 amendment to § 222 (f) of the Communications Act, 47 U. S. C. § 222 (f), where an employee protective arrangement was added by the following language:

"Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consolidation or merger,

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whose floor statements are entitled to the greatest weight, are those House members who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise.⁶ Finally, although it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not “job freeze,” was contemplated.⁷ Appellants vigorously argue that the

and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry.” See also the remarks of Senator White, a proponent of this bill, at 89 Cong. Rec. 1195–1196.

⁶ Appellants point out that several members of the conference committee opposed the motion to recommit. However, as appellants must concede, reliance on unexplained opposition to a proposal is untrustworthy at best. Witness the fact that all the House members on whose remarks appellants base their position. (Representatives Warren, Harrington, and Thomas) voted *against* the final version of the bill.

⁷ See the remarks of conference chairman Lea at 86 Cong. Rec. 10178, particularly that part of his explanation responding to questions put by Representatives Vorys and O'Connor, where it was said:

“Mr. VORYS of Ohio. Mr. Speaker, will the gentleman yield?”

“Mr. LEA. I yield to the gentleman from Ohio.

“Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?”

“Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits

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legislative history of § 5 (2)(f) supports their interpretation. However, were we to agree, it would be necessary to say that a substantial change in phraseology was made for no purpose and to disregard the statements of those House members most intimately connected with the final version of the statute.

The indications gleaned from the history of the statute are reinforced and confirmed by subsequent events. Immediately after the section was passed, interested parties—including the brotherhood appealing in this case—expressed the opinion that compensation protection for discharged employees was the intendment of § 5 (2)(f).^{*} The Commission echoed this interpretation

are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

"Mr. VORYS of Ohio. That would be whether or not they were still employed?

"Mr. LEA. Yes.

"Mr. O'CONNOR. Mr. Speaker, will the gentleman yield?

"Mr. LEA. I yield to the gentleman from Montana.

"Mr. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his employment. Does "worse position" as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

"Mr. LEA. I take that to be the correct interpretation of those words."

See also the statements of conference member Halleck at 86 Cong. Rec. 10187, and conference member Wolverton at 86 Cong. Rec. 10189. The Conference Report also lends itself to this interpretation. H. R. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68-69.

^{*} In its official organ, appellant Brotherhood of Maintenance of Way Employes stated:

"Four Years' Full Pay

"The law provides that any employee who has been in the service of a railroad four years or more, and loses his job because of a merger

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in its next annual report, I. C. C. 55th Ann. Rep. 60-61, and began imposing compensatory conditions, and only compensatory conditions, in proceedings involving \$ 5 transactions. See, e. g., *Cleveland & Pittsburgh R. Co. v. Purchase*, 244 I. C. C. 793 (1941). The Commission has consistently followed this practice to date in over 80 cases, with the full support of the intervening brotherhoods and the RLEA;⁹ indeed, in one case where a variant of the present dispute arose, the RLEA argued at length that § 5 (2)(f) did not impose a mandatory job freeze requirement—compensatory conditions would be satisfactory.¹⁰ It is true that many of these prior transactions did not involve consolidations of the magnitude here presented. However, the relevance of this point is unclear since the statute makes no distinctions based on the type of transaction considered, and it is apparent that

or 'coordination', must be paid his full wages for four years. If he has been a railroad employe less than four years, he must be paid his full wages for a period as long as his previous service.

"No such protection and compensation have ever been guaranteed by law to the employes of any other industry, and the railroad workers secured these unprecedented benefits through the Brotherhood of Maintenance of Way Employes, in a cooperative movement with the other Standard Railroad Labor Organizations." 49 Journal 13-14 (Oct. 1940).

See also 57 The Railway Conductor 308 (Oct. 1940); 39 Railway Clerk 467, 488. It is clear that the District Court did not err in taking cognizance of these publications, particularly since appellants raised no objections below. Cf. *Texas & Pacific R. Co. v. Pottorff*, 291 U. S. 245, 254.

⁹ A comprehensive list of the decided cases, with a description of the conditions imposed, is found in the Appendix to the Brief of the United States in this case. It is noteworthy that this Court has recently affirmed a case in which the Commission imposed less comprehensive conditions than those in this case. *City of Nashville v. United States*, 355 U. S. 63.

¹⁰ See Memorandum Brief of RLEA, Finance Docket No. 12460, filed in *Fort Worth & D. C. R. Co. Lease*, 247 I. C. C. 119.

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the underlying principle remains the same whether 100 or 1,000 employees are affected.¹¹

Appellants' last point is that two cases in this Court have previously treated the present question favorably to their position. *Railway Labor Executives' Assn. v. United States*, 339 U. S. 142, and *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U. S. 330. However, neither the holding nor the language of these cases, in fact, supports appellants' claim. The RLEA case was not concerned with the types of protection to be afforded employees for the first four years following the merger; the only question was whether compensatory benefits could be extended beyond four years, and the Court held they could. Appellants point to passages in the opinion, 339 U. S., at 151-154, in which they assert, the Court recognized that only one change—the four-year limitation—was blended into the Harrington amendment between origination and final approval. However, this contention ignores the plain recognition of the Court, revealed on page 152 of the opinion, that two changes occurred, one of which being the alteration in language pertinent to the resolution of this case. The *Railroad Telegraphers* case is equally inapposite. The question in that case concerned the power of a federal court to enjoin a strike over the railroad's refusal to bargain concerning a "job freeze" proposal in the collective

¹¹According to the findings of the hearing examiner in this case, 863 employees will be totally deprived of employment during the five-year period following the merger. Appellants argue that there is no need for these discharges since natural attrition will open up many more than 863 jobs during the same period. However, as the railroads point out, attrition does not work in a uniform or predictable manner and there is no indication that the elimination of surplus posts can be accomplished by the method appellants suggest; moreover, if attrition does open up suitable positions, the railroad is bound by the collective bargaining agreement to call back the discharged employees.

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bargaining contract, and there is no discussion of the present problem in the opinion of the Court.

In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct. Consequently, the judgment of the District Court must be

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 681.—OCTOBER TERM, 1960.

Brotherhood of Maintenance of Way Employees, et al., Appel- lants,	On Appeal From the United States Dis- trict Court for the Eastern District of Michigan.
v.	
United States, et al.	

[May 1, 1961.]

MR. JUSTICE DOUGLAS, dissenting.

This case is a minor episode in an important chapter of modern history. It concerns the impact of economic and technological changes on workers¹ and the manner in

¹ "In California, the Bank of America installed electronic computers in its mortgage-and-loan operation, and 100 employees are now doing the work of 300. In Cleveland, an electronically controlled concrete plant can in one hour produce 200 cubic yards of concrete in any of 1,500 mixing formulas, without a single worker performing manual labor at any point in the process.

"In a bakery in Chicago, one man operates a piece of equipment that moves 20 tons of flour an hour, replacing 24 men who used to move 10 tons an hour. In the bread-baking department of this same plant, one half of the workers were supplanted by automation, and in the wrapping department, no less than 70 per cent of the workers formerly needed have been replaced by machines.

"In the textile industry, entire plants have moved out of New England towns to set up new automated factories in the South, using a comparative handful of workers and leaving great hardship and suffering behind. In the automobile industry, new electronically controlled assembly lines helped to cut total employment by 20 per cent between 1956 and 1958, and over 200,000 workers dropped out of the United Automobile Workers from mid-1957 to early 1959.

"In the shipping industry, huge container are now packed and sealed at factories and loaded directly aboard special new compartmented ships, eliminating the need for thousands of longshoremen. In the transportation-equipment industry, production rose, but employment fell by a quarter of a million workers between January

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which government will deal with it. The courts do not determine that policy; it is a legislative matter. But the judicial attitude has much to do with the manner in which legislative ambiguities will be resolved.

There are some who think that technological change will produce both our highest industrial and business activity and our greatest unemployment. Dr. Robert M. Hutchins recently stated the basic conflict between individual freedom and technology:

"Individual freedom is associated with doubt, hesitancy, perplexity, trial and error. These technology cannot countenance. Liberty under law presupposes the supremacy of politics. It presupposes the possibility, for example, that political deliberation might lead to the decision to postpone the introduction of a new machine. Technology, on the other hand, asserts that what we can do is worth doing; the things most worth doing are those we can do most efficiently. . . ." *Two Faces of Federalism* (1961), p. 22.

The measure of the conflict is seen only in a broad frame of reference. As Dr. Hutchins said:

"Technology holds out the hope that men can actually achieve at last goals toward which they have been struggling since the dawn of history: freedom from want, disease, and drudgery, and the consequent opportunity to lead human lives. But a rich, healthy, workless world peopled by biomechanical links is an inhuman world. The prospects of humanity turn upon its ability to find the law that will direct technology to human uses." *Two Faces of Federalism* (1961), p. 24.

1956, and December, 1958. In the rubber industry, there was a drop of 25,000 workers. In the chemical industry, 36,000 workers were displaced by automation." Davidson, *Our Biggest Strike Peril: Fear of Automation*, *Look Magazine*, April 25, 1961, pp. 69, 75.

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The Secretary of Labor, Arthur J. Goldberg, recently put the problem in simple terms:

"The issue being joined in our economy today—one that is present in some form in every major industrial negotiation—is simply stated: how can the necessity for continued increases in productivity, based upon labor-saving techniques, be met without causing individual hardship and widespread unemployment?"

This case is a phase of that problem.

This is not the first instance of a controversy settled in Congress by adoption of ambiguous language and then transferred to the courts, each side claiming a victory in the legislative halls.²

The Senate passed a bill which required the Interstate Commerce Commission in approving a railroad merger to make "a fair and equitable arrangement to protect the interests of the employees affected."³ The House Committee adopted the same language.⁴ When the bill reached the floor of the House, Mr. Harrington suggested the following *proviso*:⁵

"Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers or in the impairment of existing employment rights of said employees."

² Goldberg, Challenge of "Industrial Revolution II," N. Y. Times Magazine, Apr. 2, 1961, p. 11. And see A. H. Raskin's recent series in the New York Times. N. Y. Times, Thursday, Apr. 6, 1961, p. 1, col. 3; N. Y. Times, Friday, Apr. 17, 1961, p. 1, col. 3; N. Y. Times, Saturday, Apr. 8, 1961, p. 1, col. 3; N. Y. Times, Sunday, Apr. 9, 1961, p. 1, col. 3.

³ See Newman and Surrey, Legislation (1955), pp. 158-178.

⁴ S. Rep. No. 433, 76th Cong., 1st Sess., p. 29.

⁵ H. R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

⁶ 84 Cong. Rec., pt. 9, 75th Cong., 1st Sess., pp. 9882-9883.

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That amendment would have prohibited permanently the displacement of employees as a result of mergers. It was adopted by the House.⁷ But in Conference that proviso was eliminated along with the merger provisions that gave rise to it.⁸ The House recommitted the bill with instructions that the provisions relating to combinations and consolidations of carriers be included in the bill, and be amended to provide that the Commission must include in its orders authorizing mergers "terms and conditions providing that such transactions will not result in employees of said carriers being in a worse position with respect to their employment."⁹

The Conference accepted this version, limiting the protective clause to four years. The Conference Report emphasizes that the change made in the Harrington proposal was in limiting its operation to four years.¹⁰

⁷ 86 Cong. Rec. 9887.

⁸ H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

⁹ 86 Cong. Rec., pt. 6, 76th Cong., 3d Sess., p. 5886.

¹⁰ "The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in a worse position with respect to their employment. The conference agreement, however, qualifies this provision by confining its operation to a period of 4 years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.

"In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than

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Mr. Lea, Chairman of the House Conference, stated the same in the House:

"The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, *the employees have the protection against unemployment for 4 years*, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.

"There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad

4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation." H. R. Rep. No. 2832, 76th Cong., 3d Sess., p. 69.

The Court refers to the "unexplained opposition" of Mr. Harrington to the final version of the bill. But the record offers a plausible explanation for his opposition. Mr. Harrington himself apparently had decided that the proposed amendment was objectionable because it failed to cover abandonments. 86 Cong. Rec., pt. 9, 76th Cong., 3d Sess., p. 10187. And see the remarks of Mr. Crosse, 86 Cong. Rec., pt. 9, 76th Cong., 3d Sess., p. 10192.

¹¹ 86 Cong. Rec., pt. 9, p. 10178.

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company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.

"We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement." (Italics added.)

Mr. Wolberton, another House Conferee, stated: ¹²

"It was recognized that the real intent of the sponsors was to save railroad *employees from being suddenly thrust out of employment* as the result of any consolidation or merger entered into." (Italics added.)

These are the statements ¹³ which, the Court says, "are entitled to the greatest weight" in interpreting the *proviso*. I do not think that these statements—nor any part of this legislative history—"clearly reveal an understanding that compensation, not 'job freeze,' was contemplated." Instead I find this legislative history—as the Court elsewhere seems to recognize—to be, at best,

¹² *Id.*, p. 10189.

¹³ The third House Conferee on whose remarks the Court seems to rely is Congressman Hilleek. But he merely says that the *proviso* "follows the principle of the so-called Washington agreement." What that principle was he makes clear in his next sentence: "This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and beyond that, writes it into law." *Id.*, p. 10187. The Court also relies on Congressman Lea's acquiescence in the assertions—more or less equivocal—of Congressmen Vorys and O'Connor.¹⁴ But, even assuming those assertions negative a guarantee of continuing employment, Congressman Lea's acquiescence hardly jibes fully with his more extended remarks on the same subject which I have quoted above.

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ambiguous. Compensatory relief will result in the employees bearing the initial shock of the railroads' reduction in plant. The Commission and the railroad contend for a philosophy of firing first and picking up the social pieces later. The Court seizes on ambiguous materials to impute to Congress approval of that philosophy. I would resolve the ambiguity in favor of the employees. I would read the *proviso* as meaning that nothing less than four-year employment protection to every employee would satisfy the Act, though not necessarily a four-year protection in his old job. In a realistic sense a man without a job is "in a worse position with respect to" his "employment," though he receives some compensation for doing nothing. Many men, at least, are not drones; and their continued activity is life itself. The toll which economic and technological changes will make on employees is so great that they, rather than the capital which they have created,¹⁴ should be the beneficiaries of any doubts that overhang these legislative controversies when they are shifted to the courts.

¹⁴ Lincoln in his annual message to Congress, Dec. 3, 1861, stated: "Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." V. Basler, *The Collected Works of Abraham Lincoln* (1953), p. 52.